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Ohio Courts of Appeals Reports.

(Cited O. C. A.)

Volume XXVIII.

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in the

Courts of Appeals of Ohio.

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Judges of the Courts of Appeals of Ohio.

HON. ROBERT S. SHIELDS, *Chief Justice*, Canton.

HON. LEWIS B. HOUCK, *Secretary*, Mt. Vernon.

FIRST DISTRICT.

Counties—Butler, Clermont, Clinton, Hamilton and Warren.

OLIVER B. JONES Cincinnati
GIDEON C. WILSON Cincinnati
FRANCIS M. HAMILTON Lebanon

SECOND DISTRICT.

*Counties—Champaign, Clark, Darke, Fayette, Franklin, Greene,
Madison, Miami, Montgomery, Preble and Shelby.*

ALBERT H. KUNKLE Springfield
H. L. FERNEDING Dayton
JAMES I. ALLREAD Columbus

THIRD DISTRICT.

*Counties—Allen, Auglaize, Crawford, Defiance, Hancock, Hardin,
Henry, Logan, Marion, Mercer, Paulding, Putnam, Seneca,
Union, Van Wert and Wyandot.*

KENT W. HUGHES Lima
PHILLIP M. CROW Kenton
WALTER H. KINDER Findlay

FOURTH DISTRICT.

*Counties—Adams, Athens, Brown, Gallia, Highland, Hocking, Jackson,
Lawrence, Meigs, Pickaway, Pike, Ross, Scioto,
Vinton and Washington.*

WM. H. MIDDLETON Waverly
EDWIN D. SAYRE Athens
FESTUS WALTERS Circleville

FIFTH DISTRICT.

*Counties—Ashland, Coshocton, Delaware, Fairfield, Holmes, Knox,
Licking, Morgan, Morrow, Muskingum, Perry, Richland,
Stark, Tuscarawas and Wayne.*

LOUIS K. POWELLMt. Gilead
ROBERT S. SHIELDSCanton
LEWIS B. HOUCKMt. Vernon

SIXTH DISTRICT.

*Counties—Erie, Fulton, Huron, Lucas, Ottawa, Sandusky,
Williams and Wood.*

CHARLES E. CHITTENDENToledo
SILAS S. RICHARDSClyde
REYNOLDS R. KINKADEToledo

SEVENTH DISTRICT.

*Counties—Ashtabula, Belmont, Carroll, Columbiana, Geauga, Guernsey,
Harrison, Jefferson, Lake, Mahoning, Monroe,
Noble, Portage and Trumbull.*

JOHN POLLOCKSt. Clairsville
L. T. FARRLisbon
WILLIS S. METCALFEChardon

EIGHTH DISTRICT.

Counties—Cuyahoga, Lorain, Medina and Summit.

CHARLES R. GRANTAkron
ALBERT LAWRENCECleveland
THOMAS S. DUNLAP.....Cleveland

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Volume XXVIII.

Causes Argued and Determined in the Courts of
Appeals of Ohio.

ACTION BY EXECUTORS FOR DETERMINATION OF BENEFICIARIES.

Court of Appeals for Lucas County.

THE OHIO SAVINGS BANK & TRUST COMPANY ET AL, AS
EXECUTORS, v. JASON D. CLARK ET AL.*

Decided, January 15, 1916.

*Wills—When Executors May Maintain Actions to Construe—Actions to
Construe Are Actions in Chancery—Codicil Held to Speak as of the
Date of the Testator's Death—Disposition of Stock Dividends Paid
to Executors—Delivery of Estate to Widow to Hold for Life—
Rights of Remaindermen.*

1. Executors may maintain an action by virtue of the provisions of Section 10857, General Code, to obtain a construction of a will where the estates devised are uncertain, the classes of beneficiaries in doubt, and the duty of the executors to pay a collateral inheritance tax in controversy.

*Motion to direct the Court of Appeals to certify its record in this case overruled by the Supreme Court, May 26, 1916.

2. An action to construe a will is one in chancery and appeal lies from a decree of the court of common pleas in such case.
3. Jos. L. Wolcott executed a will in 1891, devising all his estate to his widow except a bequest of \$5,000. In 1899, he executed a codicil in which by apt words he gave his widow all of his property for the term of her life. The codicil contains in addition, the following provision: "At the death of my said wife all of said property as aforesaid I give and devise absolutely to the heirs of my mother Caroline B. Cromack the same to go to said heirs *per stirpes*." The testator died in 1900, and his mother in 1884. The testator left surviving him, his widow, who elected to take under the will, but no lineal descendant. His mother left surviving her, a brother and sister, both of whom died in 1885, and the descendants of six other brothers and sisters, and also her second husband Joseph C. Cromack, who died before the testator. *Held*: That the codicil speaks as of the date of testator's death, and the devise therein to the heirs of his mother means those who were such at his death, and such devise did not lapse nor did the testator die intestate as to any portion of his estate, but his widow takes an estate for her life with remainder to the descendants of his mother's brothers and sisters *per stirpes*.
4. Dividends remaining in the hands of the executors, paid to them on stock owned by the testator, pass to his widow, whether paid in cash or stock, provided that the actual value of the stock at the time of testator's death be not depleted by stock dividends.
5. It is the duty of the executors to deliver the entire estate to the widow on the settlement of their final accounts, without security from her, in the absence of evidence showing that the rights of the remaindermen will be imperilled thereby.

Tracy, Chapman & Welles, for plaintiffs and defendant,
Mary Louise Wolcott.

Brown, Geddes, Schmettau & Williams, Smith, Baker, Effler,
& Allen, Brown, Hahn & Sanger, Fritsche, Kruse & Winchester,
Geer & Lane, R. W. Kirkley, Pierce J. Phelan, O. B. Snider,
A. Van Wagenen, George B. Cole, Kirkbride & McCabe,
D. B. Richards and C. L. Wilson, for other defendants.

RICHARDS, J.

Appeal from the court of common pleas.

This action is brought by the executors for the purpose of obtaining the direction and judgment of the court as to the true construction of the will of Joseph L. Wolcott, deceased.

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There are in the case a very large number of defendants and they include all persons who are, or claim to be, beneficiaries under the will and codicil. On the trial of the action in the court of common pleas a decree was rendered, adjudging that the beneficiaries under the codicil were the brothers and sisters of the mother of the testator, and the descendants of such brothers and sisters. From this decree an appeal was taken by the plaintiffs and by Mary L. Wolcott, the widow. The controlling facts are not in dispute, but before proceeding to the merits of the case, it is proper to dispose of some preliminary questions raised by counsel.

Certain of the defendants contend that the executors are not authorized by law to bring an action for the purpose of obtaining a construction of this will and the codicils thereto, and that the action is prematurely brought. They insist that such action can not be maintained during the lifetime of the widow of Joseph L. Wolcott. The record shows that the debts of the estate have been fully paid and that the executors have on hand and under their control a large estate, consisting of non-ancestral property and aggregating probably more than half a million dollars, and that it is necessary for the court to fix and adjudge the true construction to be placed on this will before the executors can properly conclude the administration of the trust reposed in them and make distribution of the estate, and no sufficient reason is perceived why this adjudication can not be had during the lifetime of the widow. Furthermore, the widow contends that she is entitled to the estate in fee, while other defendants claim interests therein. If her claim prevails, no duty to pay a collateral inheritance tax under G. C., Section 5331, is imposed on the executors; while if the claims asserted by other defendants should prevail, then such duty rests on them. We hold that the action is maintainable alike under Section 10857, General Code, and under the general principles of equity jurisprudence.

It is further insisted that the action is one which can not be appealed to this court. Long before the passage of the original statute now known as Section 10857, General Code, courts of chancery were called on to, and did, adjudicate cases for

the construction of wills, and the section cited is only declaratory of that early practice. Indeed, the statute itself provides for the remedy "as fully as formerly was entertained in courts of equity." We hold, therefore, that the action is one which may properly be brought into this court by appeal.

We reach, therefore, the merits of the case and are required to place a construction on the will and codicils left by Joseph L. Wolcott, and to determine who are the beneficiaries thereunder. The will bears date of July 10, 1891, and makes a bequest of five thousand dollars, which is not in dispute, and gives all the remainder of his property, after the payment of his debts, to his widow, Mary Louise Wolcott, and names her as one of the executors of his will. On December 11, 1899, Joseph L. Wolcott added a first codicil to his will, which codicil reads as follows, omitting the execution:

"Whereas I, Joseph L. Wolcott, of Toledo, Ohio, did on the 10th day of July in the year 1891, make my last will and testament as of that day I do hereby declare the following to be a codicil to the same. After the payment of all my just and lawful debts I do hereby give and bequeath to my wife, Mary L. Wolcott, for her use, for and during the term of her natural life, all my property real, personal and mixed of whatsoever character and wheresoever located, it being my intention thereby to insure to her the income of and from my property as aforesaid during her natural life.

"At the death of my said wife all of said property as aforesaid I give and devise absolutely to the heirs of my mother, Caroline B. Cromack, the same to go to said heirs *per stirpes*."

On August 11, 1900, he made a second codicil, revoking the previous appointment of executors and appointing the plaintiffs in this action as executors of his last will and testament. The entire controversy in this action centers around the following language contained in the first codicil:

"At the death of my said wife all of said property as aforesaid I give and devise absolutely to the heirs of my mother, Caroline B. Cromack, the same to go to said heirs *per stirpes*."

As stated in the brief of counsel for plaintiffs, the precise question involved is, Who are the heirs of Caroline B. Cromack

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within the meaning of this provision in the first codicil? Before reaching a solution of this question, it is necessary to consider not only the language used by the testator in his will and codicil, but his situation at the time of their execution. The terms of the codicil are such that, before any construction can be given the same, the practical necessity arises of ascertaining such facts as will place the court in the position of the testator.

As has been said, the first codicil was executed on December 11, 1899. The testator, Joseph L. Wolcott, died on December 1, 1900, leaving surviving him his widow, Mary L. Wolcott, but no lineal descendants, he never having had issue born to him. He did leave, however, surviving him one half-brother and the descendants of other half-brothers and half-sisters, these half-brothers and half-sisters being the children of his father by a former wife. The widow, Mary L. Wolcott, duly elected to take under the will. The facts necessary to put the court in the situation of the testator at the time of the execution of this codicil are as follows:

Caroline B. Cromack, his mother, died in 1884. Her will was duly admitted to probate and in this will she referred to "my adopted daughter Carrie Davis Clark," and named her as one of her beneficiaries, but there is no evidence that Carrie Davis Clark was ever legally adopted as a daughter of Mrs. Cromack. Joseph L. Wolcott was the only child ever born to Caroline B. Cromack, and he and his mother's second husband, Joseph C. Cromack, survived her. Joseph C. Cromack died about May 12, 1900, after the execution of the first codicil but before the testator's death. Caroline B. Cromack was also survived by a brother and sister, both of whom died in 1885, and also by the lineal descendants of three other brothers and three other sisters. These last named brothers and sisters died prior to her death. While there are a large number of defendants, probably more than one hundred, claiming interests in the estate, they may all be grouped into four classes as is so well and concisely done in the brief of counsel for plaintiffs. These four classes of claimants, as set forth in that brief, are the following:

a. Descendants of Joseph C. Cromack, surviving husband of Caroline B. Cromack, deceased.

b. Descendants of Carrie Davis Clark, the alleged adopted daughter of Caroline B. Cromack, deceased.

c. Descendants of the brothers and sisters of Caroline B. Cromack, deceased.

d. Descendants of the half-brother and half-sisters of Joseph L. Wolcott.

With these facts established, the court is, in a large measure, able to place itself in the situation of Joseph L. Wolcott when he executed his first codicil on December 11, 1899, and from that vantage point determine the beneficiaries he meant to include when he used in his first codicil the following language:

“At the death of my said wife all of said property as aforesaid I give and devise absolutely to the heirs of my mother, Caroline B. Cromack, the same to go to said heirs *per stirpes*.”

The most patent fact which at once suggests itself is that he himself was the only heir of his mother, but, of course, it is unthinkable that he meant to will his property to himself under the designation of heir of his mother. Neither the language of the codicil nor the circumstances surrounding the testator point to the conclusion that he meant his estate to go to his step-father, Joseph C. Cromack. If Joseph C. Cromack had been intended, the expression “*per stirpes*” would not have been used, and the natural method would have been to designate Joseph C. Cromack by name. Furthermore, the share which Joseph C. Cromack would take as husband of Caroline B. Cromack, he would not at least as to the real estate take as heir. Clearly we must look elsewhere to ascertain the persons intended by the testator by the expression “heirs of my mother
* * * *per stirpes*.”

The argument is made, and has much force, that the heirs of his mother were fixed and determined at the date of her death which was in 1884, more than fifteen years before the first codicil was made. The rule is one of the most ancient known to the law, but it is equally well settled that the word “heirs,” when used in wills, is a word which is flexible, and

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has often been held by the courts to have been used in a sense other than in its strict technical meaning. A good illustration of such use of the word "heirs" may be found in *Jones v. Lloyd*, 33 O. S., 572, but such holdings have been so frequently made that it is unnecessary to cite other cases illustrating the proposition. We have to determine, from the language used by the testator and the circumstances surrounding him, in what sense he used it. He knew that his will would not take effect until his death and that it would speak from a time subsequent to its date. It would be, until his death, ambulatory.

It is clear that when Joseph L. Wolcott referred in his will to the heirs of his mother as the ones who should succeed to his estate, he meant those who were such heirs at the time his will should take effect. He was the one whose estate was being disposed of and that disposition could only become effective at his death. That was the important date he had in mind in making his will, and those who were then the heirs of his mother were to be the recipients of his bounty and should receive his estate, postponing the time of enjoyment thereof for such time as his widow, who was given a life estate, should survive him. This, we think to be the fair intent and meaning of the language he used, under the circumstances and in the situation in which he was placed at the time he signed the first codicil to his will. The result would follow that the remainder of his estate, after the interest given to his widow in this codicil, would pass to and vest in the descendants of the brothers and sisters of his mother, *per stirpes*. Those persons would be her heirs at the time the will became effective. They would be her next of kin and the descendants of such next of kin.

It may be noted that the first will gave to the widow his entire estate absolutely, excepting a minor bequest. The evident purpose of making the first codicil was to revoke that portion of the will and to give her, in lieu thereof, the estate named in this codicil, and the right was taken from her in a later codicil to be one of the executors of the estate. In the light of these facts, it is apparent that she is not given any greater rights than those specifically provided in the first codicil. The important limitation on her estate, therein mentioned, mani-

feels an intent which to fail to follow would amount to making a will for the testator. In view of the manifest purpose of the testator, on the date of the first codicil, to make a codicil which should dispose of his entire estate, and in view of the fact that his mother had heirs, we can not reach a conclusion, as contended by plaintiffs, that the devise intended for those heirs lapsed, and that the widow would succeed to the estate as his heir. Neither can we find that the codicil is of such doubtful import as to be invalid. On the contrary, a majority of the court are of the opinion that the entire estate which the widow receives under the will is that, and that only, which is specifically provided for her in the language of this first codicil, and that Joseph J. Wolcott did not die intestate as to any portion of his property. We reach this conclusion the more readily in view of the well known presumption against intestacy where a will is executed evidently intending to dispose of the entire estate.

In view of this decision that the widow does not receive the entire estate, it becomes important to decide another question raised on the record. The petition sets out that the testator was the owner at his death of five hundred and one shares of the capital stock of The National Supply Company of the par value of one hundred dollars each, which stock was then of the actual value of two hundred and fifteen dollars per share. On this stock large dividends have been paid since the death of the testator, some of them in cash and some in stock, the dividends aggregating perhaps eighty thousand dollars or more. A portion of this stock was used in the payment of debts of the estate, and the executors are in doubt and ask the opinion of the court as to what disposition to make of certain of these dividends. Under the facts and circumstances existing in this case, and upon an examination of the authorities cited by counsel, the court holds that the widow is entitled to receive all of the dividends declared and paid, whether in stock or cash, provided that the original actual value of the stock remaining, after such portion as was legitimately used in the payment of debts, shall not be depleted by stock dividends, below the actual value, at the time of the death of the testator, of the stock not used in the payment of debts.

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The petition of the executors asks the instructions of the court with regard to the delivery of the estate in their hands. Having determined that the widow is entitled to the estate for her use during the term of her natural life, it being the intention of the testator, according to the language of the codicil, thereby to insure to her the income from the property during her life, we know of no sufficient reason why the executors, upon filing their final accounts and having the same approved, should not turn the entire estate over to her to hold under and pursuant to the right given her by the language of this codicil. The evidence does not disclose danger or insecurity to the remaindermen if this be done without bond. The rules applicable under such circumstances seem to be clearly stated in 16 Cyc., 641, and are, in substance, that, in the absence of a showing of actual danger, an inventory is the only protection to which a remainderman is entitled, and that the tenant for life of personal property is usually entitled to its possession without giving security for the forthcoming of the property at the termination of the life estate. If, however, the widow should so desire, the court will allow the continuance in office of the plaintiffs, as trustees, they being the ones designated in the last codicil of the testator.

A decree may be drawn in accordance with the views expressed in this opinion.

CHITTENDEN, J., concurs.

KINKADE, J. (dissenting).

I can not concur in the views of the majority of the court with respect to the effect of the first codicil, in so far as it makes a disposition of the remainder of the estate over and above the life estate to Mrs. Wolcott. It is an ingenious and helpful aid, in ascertaining the intention of a testator, to first supplement the will and then look for his intention as indicated by the will thus supplemented. It is far easier to find the intention by this method than it is to find authority in the law for pursuing this course. I think the first codicil of the will fails, by reason of its uncertainty and for the reason

that no one designated in this codicil as taker survived the testator, and he, therefore, died intestate as to this portion of his estate and the same must go to his wife as his sole heir.

GENERAL AND SPECIAL ELECTIONS DISTINGUISHED.

Court of Appeals for Hamilton County.

WALTER M. YEATMAN ET AL V. STATE OF OHIO, EX REL STIERINGER.

Decided, March, 1914.

Elections—Per Diem of Judges and Clerks—Vote on Constitutional Amendments Constitutes a Special Election—Unless Held on the Date of the Regular November Election.

1. The term "general election" is applicable, under the provisions of the Constitution and statutes of Ohio, to elections only which are held on the first Tuesday after the first Monday in November.
2. The election held on September 3, 1912, for the purpose of adopting or rejecting certain amendments to the Constitution, although statewide and of the utmost importance, was nevertheless a special as distinguished from a general or regular election; and while the labor may have been as arduous as that required at a general election, payment to judges and clerks for their services on that day must be fixed in accordance with the schedule provided for such services at special elections.

John A. Deasy, Assistant Attorney-General, for plaintiff in error.

William Thorndyke, contra.

JONES (Oliver B.), J.

The question to be determined in this case is whether the election held September 3, 1912, at which certain proposed amendments to the Constitution of Ohio were submitted to a vote of the people of the state, was a general election, or a special election within the terms used in Section 4944 of the General Code of Ohio, which fixed the amount of compensation to be allowed to the judges and clerks of election.

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An act to provide for the election and assembling of the convention to amend the Constitution, found in 102 O. L., 298, in Section 4, conferred upon the constitutional convention authority to fix and prescribe the time, form and manner of submitting the proposed amendments, and in Section 5 provided how the election should be held and the returns made and canvassed.

Under the authority conferred by this act the constitutional convention, by resolution, fixed the third day of September, 1912, as the date of the election, and provided in its schedule in that resolution under the head of "Method of Submission" that the separate proposed amendments should be submitted "at a special election to be held" on that date. This resolution further provided "said special election shall be held pursuant to all provisions of law applicable thereto, including special registration" and provided for the carrying on of said election, and prescribed a form for an official ballot headed as follows: "Official Ballot. Special Election Tuesday, September 3, 1912. Amendments to the Constitution."

The Constitution as it stood prior to this election provided in Article XVII, Section 1, for the election of state and county officers on the first Tuesday after the first Monday in November in the even numbered years, and for election of all other elective officers on the same day in the odd numbered years; and in the latter part of Section 2 of this article in providing for the filling of vacancies "by election at the first general election for the office which is vacant" it evidently refers to the November election provided for in this article as "a *general* election."

In the provisions found in Article XVI of the Constitution as it existed prior to this election, Section 1 provided for the submission of the proposed amendments "at the next election for senators and representatives." Section 2 of the same article provided for the submission of the question as to whether it is necessary to call a constitutional convention "at the next election for members of the General Assembly"; and Section 3 provided for the submission of the question as to whether a constitutional convention shall be held "at the general election" to be held in the year 1871 and in each twentieth year thereafter.

Article II, Section 2, fixes the date for the election of senators and representatives, and Article III, Section 1, fixes the date for the election of executive officers. The Constitution of 1851 originally fixes this date as the second Tuesday in October, and afterwards, October 18, 1885, it was changed by amendment to the first Tuesday after the first Monday in November.

Title 14 of the General Code is devoted to public elections, Chapter 2 therein providing for the time and notice of elections. Section 4826 therein provides for "all general elections" for the governor and other state and county officers, fixing it on the day provided by the Constitution—the first Tuesday after the first Monday in November in the even numbered years.

Sections 4831, 4835, 4836 and 4838 fix the time of elections of township and municipal officers and members of the board of education, all being as fixed by the constitutional provision the first Tuesday after the first Monday in November in the odd numbered years.

In Section 4832 the "regular election" for township officers is referred to.

Section 4829 provides for a "special election" to fill a vacancy in the office of congressman or member of the General Assembly. Such election may be held and conducted as in case of a "regular election."

Section 4840 distinguishes between the submission of a question at a "special" election or at a "regular" election. And Section 4870 uses the phrase "at any general or special election."

Section 4941 makes full provision for special elections in registration cities.

The term "November election" is repeatedly used in the statutes. It is referred to in Sections 4845 and 4846 with reference to the fixing of election precincts, and in Sections 4893, 4915, 4917, 4919, 4920, 4921 and 4925 with reference to registration.

In Chapter 6, relating to primary elections, Section 4948 specifies that words and phrases in that chapter shall be construed as follows:

"The words 'November election,' the election held on the first Tuesday after the first Monday in November in any year.

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"The words 'general election,' the November election in the years when state and county officers are to be elected."

Sections 4949, 4967 and 4980, relating to primary elections, use the term "general election"; and Section 4980 provides that "Affiliation shall be determined by a vote of the electors making application to vote, at the *last general election held in even numbered years.*"

It therefore appears that the provisions of the Constitution and the General Code recognize "regular" elections and "primary" elections, and "general" elections and "special" elections. The term "regular election" seems to be used in the same way and to mean the same thing as the term "general election."

The Legislature has, in Section 4948, construed the term "general election," limiting it to the November election in even numbered years, while the language used in Section 4980 would seem to indicate there might be a general election held in odd numbered years.

A careful consideration of all the constitutional provisions and statutes cited above compel the court to the opinion that the term "general election" was intended to apply only to the elections held on the first Tuesday after the first Monday of November both in the even and in the odd numbered years, and that all other elections would be special elections except the "primary elections," which are another class and otherwise provided for. A general election is one held throughout the state at regularly recurring intervals for the purpose of electing public officers and possibly at the same time voting upon such public questions as might be then legally submitted, while a special election is one held at some other time to vote upon public questions or to elect officers to fill vacancies.

It has been argued that the term "general" would necessarily be applied to every election that was state-wide and held at every polling place at the same time, but it can be readily seen that an election might be held on one question, such as the issue of state bonds for some public purpose or any other public question that might require a vote of the entire people of

the state. Such question, while general with respect to the state-wide interest, would not necessarily require such an election to be classed as a "general election." The election of September 3, 1912, like any election held to amend or modify the provisions of the Constitution, was of the utmost importance to all the citizens of the state and involved matters of the greatest general interest to its voters. This particular election was denominated as a special election by the constitutional convention that provided for it, and it certainly was special in that it was fixed for a day when no other question would engage the attention of the voters and each proposed amendment submitted might receive the special and undivided consideration of every voter.

We must therefore hold that this election was, in the meaning of the statute, a special election, and while the labor required of the judges and clerks in receiving and canvassing the votes may have been even more arduous than that of a general election, the question of payment for the full value of the services rendered is one that is not addressed to the court, and the court can only determine what has been provided by statute for such service.

The judgment below is reversed.

SWING, J., and JONES (E. H.), J., concur.

PRESUMPTION OF INNOCENCE IN A CONTEMPT PROCEEDING.

Court of Appeals for Knox County.

JUDSON LONEY ET AL V. J. C. HALL.

Decided, October 25, 1917.

Finding of a Trial Judge on the Evidence—Will Not be Disturbed by a Reviewing Court, When—Degree of Proof Required to Convict of Contempt.

1. The judgment of a trial judge who has passed upon the sufficiency and weight of the evidence will not be disturbed, where the evidence is such that different minds might reach different conclusions.

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2. A proceeding for contempt is *quasi*-criminal in its nature with the presumption in favor of the innocence of the defendant, and conviction can be had only on an affirmative showing of guilt.

F. O. Levering and R. L. Carr, for plaintiff in error.

L. C. Stillwell and Greer & Cromley, contra.

HOUCK, J.

Error is here prosecuted in which it is sought to reverse the finding and judgment of Hon. Park B. Blair, judge of the Common Pleas Court of Knox County, Ohio, in his dismissal of contempt proceedings filed by plaintiffs herein against defendant for alleged violation of a judgment heretofore rendered in the common pleas court in which said J. C. Hall was enjoined and restrained from engaging in the hardware business in Danville or Buckeye City, Ohio.

The proceedings in contempt were heard by the trial judge upon the evidence offered, which is now before us in the form of a bill of exceptions. The trial court dismissed the action in contempt and held the accused J. C. Hall guiltless. By this proceeding in error it is sought to reverse the judgment of the court below.

It is claimed by counsel for plaintiffs in error that the defendant violated the injunction heretofore granted by the common pleas court and that he is now engaged in the hardware business. Counsel for defendant in error insist that said Hall is not engaged in the hardware business, but is conducting what is known as a racket store.

The only question to be determined in this case is one of fact, namely: Is J. C. Hall now engaged in the hardware business in the villages of Danville or Buckeye City, Ohio? This question was submitted to the trial judge. It was a question of fact, and he was called upon and did pass upon not only the sufficiency but the weight of the evidence.

The rule of law is well known that a reviewing court will not reverse a judgment on the weight of the evidence unless it manifestly appears that the judgment is against the weight thereof. We have read the testimony of all the witnesses, as embodied in the bill of exceptions, and we find the evidence to be conflicting;

different minds might arrive at different conclusions therefrom, and as a matter of fact it took this court some time to be unanimous in its conclusion as to whether or not the defendant had violated the former order and judgment of the common pleas court.

Thus it follows that where different minds might arrive at different conclusions or different results, from the same evidence, and the case having been tried to a trial judge who has the same power, authority and right to determine as to the sufficiency as well as the weight of the evidence as a jury, and having done so, a reviewing court has no authority to reverse such judgment, unless upon the whole record it is clearly manifest that a different judgment should have been rendered—and this we do not find.

We are of the opinion that this being a *quasi*-criminal case the evidence should be clear, positive and convincing that the one charged with contempt is guilty, before a court so finds. We think the rule of evidence in cases such as the one now under review requires stronger proof in order to find one guilty of contempt than simply a preponderance. In fact, in a *quasi*-criminal proceeding such as the one at bar the presumption is all in favor of the person charged with the offense, namely, in favor of innocence. In such a case it must affirmatively appear in the record that the person so charged with contempt is guilty.

Applying this rule of law to the facts as established by the evidence in the bill of exceptions, and after a careful examination of the entire record in this case, we are bound to and do arrive at the conclusion that the judgment of the trial judge in the present case is right and should be affirmed.

Judgment affirmed.

POWELL, J., and SHIELDS, J., concur.

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**DEGREE OF CARE DUE FROM A MOTORMAN TOWARD A
CHILD OF TENDER YEARS.**

Court of Appeals for Lucas County.

THE MAUMEE VALLEY RAILWAY & LIGHT COMPANY v.
KENNETH HANAWAY, A MINOR.*

Decided, December 6, 1915.

Negligence—Child Three Years of Age Struck by Electric Car—Greater Care Required Toward Child Than an Adult—Can be No Inference as to What Child Will Do—Instructions to Jury Must be Construed With Reference to the Facts of the Case—Special Findings May be Signed by Nine Jurors Only—Misconduct Must be Brought Upon the Record.

1. Where a child of immature years and incapable of realizing and appreciating the proximity of danger is threatened with injury by an electric car, the electric railway company, in order to discharge its duty of exercising ordinary care, is required to use greater care than in a case where an adult is so threatened.
2. A charge of the court is to be read with reference to the facts in the case on trial, and the words "near the track" are not indefinite where the jury could not have understood them to mean other than close proximity to the track.
3. With a child of very tender years there is no inference that it will either run in front of a car or away from it, and a motorman should operate his car with knowledge that a child of that age may do either, and it is his duty to use ordinary care to avoid injuring it.
4. Where a general verdict is signed by twelve jurors, special findings of fact signed by nine jurors are properly received by the trial court.
5. Alleged misconduct occurring during the trial in the presence of the court should be brought upon the record by bill of exceptions certified by the trial judge, and may not be shown by affidavit.

Tracy, Chapman & Welles, for plaintiff in error.
S. S. Burttsfield and John L. Zimmerman, contra.

*Motion to direct the Court of Appeals to certify its record in this case overruled February 15, 1916, and motion to dismiss petition in error sustained.

CHITTENDEN, J.

Error to the court of common pleas.

The plaintiff, in the common pleas court, recovered a verdict and judgment against the defendant in the sum of \$10,000 because of personal injuries sustained by the plaintiff. The plaintiff, who sued by his next friend, was at the time of the accident a minor slightly under three years of age.

On or about the 16th day of June, 1914, he, with some other children, was playing near the corner of Utah and Fassett streets in the city of Toledo. The defendant was operating an electric car upon the tracks of the Toledo Railways & Light Company on Fassett street. At the time in question the car stopped on Fassett street just west of the intersection of Utah street, for the purpose of taking on a passenger. After the car started, and at about the time it crossed the easterly side of Utah street, it is claimed that the plaintiff was struck by the car and after being carried or dragged some distance the wheels ran over his left leg at about the ankle, so crushing the ankle and foot as to necessitate an amputation at about the shoe top.

It is claimed by the plaintiff that while the car was standing at the point where it stopped to take on a passenger the plaintiff, with some other children, started to go across Fassett street from the north side to the south side thereof, and that they were in plain view of the motorman and conductor, and that when the plaintiff was about sixty feet in front of the car the motorman and conductor, without any notice or warning of the plaintiff who was then crossing Fassett street and about to cross the railway tracks, carelessly and negligently started the car forward and that while the plaintiff was on the tracks of the railway company in front of the car and in plain view of the motorman and conductor operating the same, the car was so negligently and carelessly operated as to run over the plaintiff's left foot and leg, although there was ample time to stop the car before it struck the plaintiff. Evidence was introduced on the part of the plaintiff tending to prove these allegations.

Several claims of error are made in this court. It is claimed that the court erred in its charge to the jury upon the subject

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of the amount of care required of the defendant company and complaint is especially made as to the following language:

“A street railway company in the operation of its cars is required to exercise a much higher degree of care toward a child who, owing to its immature years, is incapable of realizing and appreciating the proximity of danger and the necessity of care and caution to avoid injury, than is required toward an adult whose age, knowledge and experience better enable him to look out for himself. A motorman operating a car on a street where he has reason to expect the presence of children must exercise a high degree of watchfulness and if he sees, or by the exercise of ordinary care could see a child of tender years on or near the track, he is not entitled to act on the assumption that such child will get off or stay off the track, but must at once use ordinary care to avoid injuring him, and if by the exercise of ordinary care he might have discovered the child in time to have avoided injuring him and fails to do so, the company is liable for the resulting injuries.”

Just previous to using the language above quoted the court had charged the jury that the plaintiff could only recover in case he proved by a preponderance of the evidence the negligence charged in the petition, and the court carefully defined the legal meaning of the term negligence. He had also defined ordinary care at considerable length and with accuracy. He had charged the jury, in substance, that the amount of care that was to be exercised to comply with the definition of ordinary care varied according to the circumstances of particular cases. He had made use of the following language:

“The court instructs you that if the necessity of using ordinary care is called into existence under circumstances of particular peril a greater amount of care is required than when the circumstances are less perilous.”

Following immediately upon the discussion of this subject he used the language first above quoted. Construing the language first above referred to, in connection with what preceded it in the charge, it is evident that what the judge intended to charge the jury was that where a child of immature years, incapable of realizing and appreciating the proximity of danger,

was threatened with injury by an electric railway company, the railway company, in order to discharge its duty of exercising ordinary care, was required to use greater care than in a case where an adult was so threatened. The language of the court in saying that an electric railway company "is required to exercise a much higher degree of care toward a child" was not an accurate statement. He should have said that an electric railway company, in the exercise of ordinary care under such circumstances, was required to use more care with reference to a child than toward an adult. The charge, however, could not have misled the jury in view of all that had been said by the court upon the subject of the degree of care required of the defendant. We think that the charge states the law substantially as required under the authority of *Rolling Mill Company v. Corrigan*, 46 O. S., 283. The court, on page 291, makes use of the following language:

"The almost universally accepted doctrine is, that the care to be observed to avoid injuries to children, is greater than that in respect to adults. That course of conduct, which would be ordinary care when applied to persons of mature judgment and discernment, might be gross, and even criminal negligence, toward children of tender years. The same discernment and foresight, in discovering defects and dangers, can not be reasonably expected of them, that older and experienced persons habitually employ; and therefore the greater precaution should be taken, where children are exposed to them."

It is also claimed that the court erred in charging the jury that a motorman operating a car on a street where he has reason to expect the presence of children must exercise a high degree of watchfulness, and if he sees or by the exercise of ordinary care could see a child of tender years on or near the track, he is not entitled to act on the assumption that such child will get off or stay off the track, but must at once use ordinary care to avoid injuring him, and if by the exercise of ordinary care he might have discovered the child in time to avoid injuring him and fails to do so, the company is liable for the resulting injuries." It is claimed that the words "near the track" are so indefinite as not to indicate any definite situation to the jury,

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and that the child might be said to be near the track if he were at any point in the street. Every charge must be read with reference to the facts in the case under consideration. It is evident that the jury could not have understood this term to mean anything other than that if the child was in close proximity to the track, and we think that the phrase was sufficiently definite in that respect.

This portion of the charge is said to be in conflict with a special instruction given before argument at the request of the defendant, being request number six, in which the jury were instructed that those engaged in the operation of the street car were not required to assume that children on the streets would run suddenly into the path of such car and they were not required to so operate their cars as to be able to stop them instantly if a child should do so. We are unable to find that the general charge contradicts or modifies the special instruction. The special instruction was an abstract proposition of law and was certainly as favorable to the defendant as it could have been made. The word children used therein covers a considerable range in age, and it is certainly true that the railway company is not required to stop its cars instantly if a child should suddenly and without warning run in front of the car. With a child of the age of the plaintiff we think that the motorman is not to infer either that the child will run in front of the car or run away from the car. At such an age a child is likely to do either one of these things, and a motorman should operate his car with the knowledge that children of that age are not appreciative of the dangers that are threatening them and that they are likely to act ill-advisedly under such circumstances as otherwise. The jury were instructed that it was the duty of the motorman in case of a child of such tender years being on or near the track—that is, in close proximity to the track—to at once use ordinary care to avoid injuring it. We think that the charge in this respect was a correct statement of the law.

There are some other criticisms made upon the general charge, but what we have stated we think sufficiently covers the other objections presented.

The general verdict was signed by twelve jurors. The defendant requested a special finding of fact, and the same was submitted to the jury and was answered by them, the answer being signed by nine only of the twelve jurors. The special finding of fact was as follows:

"Did Kenneth Hanaway get on the street car track in front of the car and in plain view of the motorman operating said car and so far ahead of the car that the motorman, in the exercise of ordinary care, had time to stop the car before it struck him?"
Answer: "Yes."

The plaintiff in error contends that it was entitled to have this interrogatory answered by the unanimous vote of the jury, and that the court erred in accepting an answer signed by only nine of the twelve jurors. The plaintiff in error claims that an interrogatory of this character can only be answered by the unanimous action of the jury. Section 11455, General Code, passed in pursuance of the constitutional amendment permitting such legislation, provides that in all civil actions a jury shall render a verdict upon the concurrence of three-fourths of their number. The answering of special interrogatories by the jury is covered by Section 11463, General Code, which provides as follows:

"When either party requests it, the court shall instruct the jurors, if they render a general verdict, specially to find upon particular questions of fact, to be stated in writing, and shall direct a written finding thereon. The verdict and finding must be entered on the journal and filed with the clerk."

The latter section does not by its terms require any given number of jurors to determine the question of fact, nor does it require the answering of the interrogatory unless the jury shall render a general verdict. The provision is that if a general verdict is rendered then the jury shall make a written finding upon the interrogatories. Thus, it will be seen that the general verdict and the interrogatories were placed upon the same basis and that only when the general verdict was agreed upon were the special interrogatories to be determined. When the Con-

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stitution and statute required the unanimous vote of the jury to render a general verdict it was no doubt the law that the special interrogatories could only be answered by unanimous vote of the jury. It required the same number to answer the special interrogatories that was required to render the general verdict. When the constitution and statutes were so amended as to permit a verdict by the concurrence of three-fourths of the jury, it would seem to follow from a fair interpretation of Section 11463, that the special interrogatories which were to be answered in case a general verdict was returned might be answered by three-fourths of the jury. Clearly if the jury are entitled under the Constitution and laws, as they are, to determine by a three-fourths vote, in a general verdict, all the issues involved, it must follow that they are entitled to determine by a three-fourths vote every particular ultimate fact submitted by an interrogatory.

The answer to this question could not be prejudicial in any event because the interrogatory submitted, if not answer of if answered in the negative, would not necessarily require any different judgment. We think that the pleadings and the evidence did not make it necessary that the jury find that the plaintiff was on the street car track and in front of the car in order to establish a liability upon the part of the defendant.

Misconduct upon the part of the plaintiff is charged, and it is claimed that such misconduct consisted in either the next friend of the plaintiff or his attorneys permitting the plaintiff to be upon the floor, immediately in front of the jury, during the argument of counsel for the plaintiff, walking upon one foot and one knee or upon both knees, and that such conduct upon the part of the plaintiff, so acquiesced in by the next friend of the plaintiff and his counsel, unduly aroused the sympathies of the jury. This alleged misconduct is not made manifest by the bill of exceptions, but was sought to be shown by affidavits of two jurors presented to the trial court upon the hearing of the motion for a new trial, which affidavits are attached to the bill of exceptions and constitute all the evidence upon the subject presented to the trial judge. The affidavits contain nothing more than a recital of the fact that they saw the plaintiff move

around as above indicated. They do not undertake to state what, if any, effect such action upon the part of the plaintiff had upon them or the jury generally. It is, of course, apparent that affidavits of jurors can not be received for the purpose of impeaching or explaining their own verdict. It does not appear in the record of the trial that there was such conduct as is set forth in these affidavits, and we hold that under the authority of *State v. Young*, 77 O. S., 529, the question here sought to be raised can not be properly brought into the record by affidavits as was attempted in this case.

Finally, it is claimed that the verdict is excessive and is not sustained by sufficient evidence. We are not prepared to say that the verdict is excessive in view of the suffering endured by the plaintiff and the fact that he will be deprived of his left foot during his entire lifetime. At the plaintiff's age, three years, his expectancy of life, according to the Carlisle tables of mortality, was substantially fifty years. At no age is the expectancy of life materially greater than at the age of three years. This is almost the maximum period of expectancy.

The plaintiff presented three witnesses who claimed to have seen the accident. Two of these were employees of the Big Four Railroad Company, one being an engineer and the other his fireman. They were men of experience and appeared to be intelligent and fair witnesses and their evidence is wholly unimpeached. Both testify that when approximately two hundred feet in front of this car they saw it strike the child and that they immediately ran toward the car, one of them swinging his cap to indicate, as a railroad man would, a stop signal, and both yelling to attract the attention of the motorman, and both testify that the motorman was looking back toward the rear of the car, and not forward, and that they were unable to attract his attention until they were nearly to the car; that during this time the child was under the fender, either holding on or being dragged by reason of having its clothing caught, and that it was screaming and struggling apparently to escape from its position; that when they had almost reached the car the child had been released from its position and the wheels of the forward truck

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ran over its left foot. Another witness, a girl about seventeen years of age, in many respects corroborates the testimony of these two witnesses. The only witness on behalf of the railway company who was in position to know much about the facts was the motorman himself, whose evidence is contradictory to that of the three witnesses just mentioned. It is evident that the jury gave little credit to the testimony of the motorman.

We think that the case was fairly tried and that the rights of the plaintiff in error were at all times fully protected. The charge of the court, both before and after argument, was certainly as favorable to the company as it had the right to expect.

A careful examination of the record discloses that there was no error committed during the trial sufficiently prejudicial to justify a reversal of the judgment, and that the judgment accomplished substantial justice.

Judgment affirmed.

RICHARDS, J., and KINKADE, J., concur.

GOVERNMENTAL FUNCTIONS EXERCISED BY A MUNICIPALITY.

Court of Appeals for Cuyahoga County.

SEBASTIANO RUSSO, ADMINISTRATOR, v. CITY OF CLEVELAND.

Decided, November 12, 1917.

*Collecting Garbage—Not a Governmental Function—Negligence of a
Garbage Collector the Negligence of the City Employing Him.*

The collection of garbage by a municipality is not a governmental function, and in an action against a municipality for damages on an account of the death of the plaintiff's intestate through the negligence of a garbage collector employed by the municipality, it is error to direct a verdict for the defendant.

G. E. Morgan and B. D. Nicola, for plaintiff in error.

Jas. T. Cassidy, contra.

GRANT, J.

Error to the court of common pleas.

The plaintiff—both here and below—brought suit for the death of his intestate, caused, as he said, by the wrongfully negligent act and omission of the defendant, the city of Cleveland.

Upon the case being brought to trial before a jury, it was made to appear that the deceased came to his death from a collision between himself while lawfully on a public street or way and a wagon engaged at the time in collecting garbage and being operated by, and under control of the servants of the defendant city.

The case was arrested from the jury at the end of the plaintiff's evidence and a judgment rendered for the defendant, by the court, on the single ground, it is said, that the city's servants in doing or omitting to do what they did or should have done, whereby the intestate came to his death, were exercising a part of the sovereignty of the state and performing a governmental function, for the untoward result of which the defendant could not in law be held to an account, nor its delinquencies in that respect challenged or called in question in the courts. And this is the only question presented by the record and argued in the case.

We do not propose to discuss the decisions brought to our attention from courts outside of Ohio, as we do not regard them in point when the facts of each are examined, or applicable in point of law when brought to the test of some obvious principles which we do consider as settled in this state and which we are inclined to allow in determining our conclusion in this case. Nothing could concretely be more at variance with one's natural notions as to the office and dignity of sovereignty, than the gathering of garbage as it is commonly done on the streets. Nothing could well be further from our innate ideas of the power and dignity of the state than the collectors of garbage, whom we are asked to recognize and protect as legally inerrant as the representatives of the supreme commonwealth and of the one who can in the law's eye do no wrong. But that is, perhaps, a matter of sentiment; sovereignty in legal contemplation is not to be

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identified by the smell of the thing, but by what the smell stands for and legally means.

In this case the immediate sovereign, the image and superscription of the state, is the defendant, a municipal corporation, to which, as the judgment we are considering says has been parcelled the supreme power, to be deemed sacresanct in this case.

Speaking of that entity, a municipal corporation, in the respect we are now considering, our Supreme Court, in *Cincinnati v. Cameron*, 33 O. S., 336, at 367, say:

"In its governmental or public character, it represents the state, while in the other it is a mere private corporation. As a political institution, the municipality occupies a different position, and is subject to different liabilities from those which are imposed upon the private corporation. But because the two characters are united in the same legal entity, it does not follow that the shield which covers the political equally protects the private corporation.

"The power given a city to construct sewers, is not a power given for governmental purposes; nor is it a public municipal duty imposed upon the city, like that of keeping streets in repair, but it is a special legislative grant to the city for private purposes. The sewers of the city, like its works for supplying the city with water, are the private property of the city; the corporation and its corporators—its citizens—are alone interested in them; the outside public, as people of the state at large, have no interest in them, as they have in the streets of the city, which are public highways. *Detroit v. Corey*, 9 Mich., 165."

The test thus furnished is easily applied to the case at bar. The people of the state at large have no interest in the disposal of garbage in Cleveland. That is for the convenience and health of a part only of the inhabitants even of the city—its householders. No distinction in principle is perceived between sewer service and garbage collection; if there is any, we think the former comes nearer to being a governmental function than the latter, as it answers a wider purpose and is for the advantage of a larger portion of the public. And the distinction becomes more marked, we think, upon the consideration that the municipality derives, or may derive, a revenue from its garbage, in which manifestly the people of Ohio outside of Cleveland can not share.

After some further discussion of what constitutes the dividing line between governmental agencies and municipal enterprises, the case last cited goes on to say:

“With regard to the liability of a municipal corporation for the acts of its officers, the distinction is, between an exercise of those *legislative powers which it holds for public purposes, and, as a part of the government of the country*, and those private franchises which belong to it as a creature of the law; within the sphere of the former, it enjoys the exemption of government, from responsibility of its own acts, and for the acts of those who are independent corporate officers, deriving their rights and duties from the sovereign power. But in regard to the latter, it is responsible for the acts of those who are in law its agents, though they may not be appointed by itself. *Commissioners v. Duckett*, 20 Md., 476.”

Here again we have a standard easily brought to bear upon the present case; the power exercised which carries with it immunity from liability must be one held “*for public purposes, and, as a part of the government of the country.*” To spread the immunity over all the subordinates of a government and thus to clothe all alike with an exemption which amounts to an attribute of sovereignty, seems to confound all just notions of what sovereignty means and to put a tide-waiter on a par with its president, assimilating the office of the one to that of the other and surrounding each with equal dignity and importance.

If the line between an agency of government, carrying with it exemption from liability for the torts of the agent, and persons whom the law does make responsible for their wrongdoings, can not be drawn higher than a collector of garbage, it is hard to see that it can be drawn anywhere. All city employees will alike be clothed with legal immunity and will be safeguarded in their acts, whatever they may do or omit. This result would push the doctrine to a perilous consequence, as seems to us, but if the court below was right in taking this case from the jury, we see no escape from the view that such a conclusion must be accepted as law.

We think the case already discussed—*Cincinnati v. Cameron*, *supra*—points out the rational and true line of cleavage to be

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observed, namely, that "the public of Ohio," as people of the state at large, have no interest in the work in which the city of Cleveland was engaged when the plaintiff's intestate came to his death in consequence of the city's negligence while so engaged, and that, as a consequence, the city can not escape any just liability thus caused and occasioned.

We reach this conclusion notwithstanding the arguments of counsel to the contrary and the cases marshalled to support them, believing that none of the latter are of authority compelling a different consequence. Most, if not all, of the cases can, we think, be differentiated from the case in hand, but we shall not take the time to do so; we have, however, examined them with suitable attention.

For error of law in arresting the case from the jury and rendering judgment, thereupon, for the defendant, the court below was in error, as we find. For that error the judgment is reversed and the cause is remanded to that court for further proceedings not at variance with law.

**FAILURE TO DELIVER CARS BECAUSE OF AN EMBARGO
DOES NOT PREVENT THE RUNNING OF
DEMURRAGE.**

Court of Appeals for Lucas County.

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY
COMPANY V. FRED MAYER ET AL.

Decided, July 22, 1916.

Carriers—Cars Held for Delivery Within a Switching District—Delivery Prevented by Reason of Disability of the Consignee to Receive Them.

When a railroad company notifies a consignee of the arrival of cars containing grain and upon receiving switching instructions immediately gives notice to such consignee of inability to make delivery because of an embargo duly promulgated and notice of which

had been given the various railroads, and no further order for the disposition of the grain is given by the consignee and the railroad holds the cars until the embargo is lifted and then delivers them in accordance with the switching instructions, the consignee is liable for demurrage charges.

Doyle, Lewis, Lewis & Emery, for plaintiff in error.
Marshall & Fraser, contra.

CHITTENDEN, J.

Error to the court of common pleas.

This action originated in the city and justice court of the city of Toledo and was for the recovery of twenty-one dollars, the amount alleged to be due for demurrage on five cars of grain. In that court judgment was rendered in favor of the plaintiff for the full amount claimed. Upon appeal to the common pleas court a jury was waived and the cause was submitted to the court and a judgment was rendered in favor of the plaintiff for the sum of five dollars. The railroad company now seeks to reverse this judgment.

There is no dispute as to the five-dollar demurrage charge upon one of the five cars. The other four cars were consigned to Toledo with instructions to give notice to the J. F. Zahn Company, of which firm the defendants were the constituent members. These cars arrived on July 17th and notice of their arrival was given to the J. F. Zahn Company on July 18th, whereupon that company notified the plaintiff to deliver the cars to the National Milling Company which was located on the tracks of the Wheeling & Lake Erie Railroad Company. It appears that because of an accumulation of cars upon the tracks of the National Milling Company, the Wheeling & Lake Erie Railroad Company had promulgated an embargo upon grain destined to that company, notice of which embargo had been given to the various railroad companies on July 18th. After receiving the switching instructions from the J. F. Zahn Company, the plaintiff notified that company of the embargo and of its inability to deliver cars to the Wheeling & Lake Erie Railroad Company for the National Milling Company, because of the same. No further orders for the disposition of the grain were given the plaintiff

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and the cars were held until July 25th when the embargo was lifted and delivery was made in accordance with the instructions.

The legal question presented is, whether under such state of facts, the defendant is subject to the demurrage charge. It appears from the evidence that the rule under which the demurrage charges in question accrued was on file with the Interstate Commerce Commission and the Railroad Commission of Ohio, now the Public Utilities Commission, and was as follows:

“When cars are held by a road for delivery within a switching district and can not be received by the switching line owing to the disability of the consignee, notice must be promptly given by the switching line to the road holding the cars in order that it may give notice to the consignees.”

“The agent of the holding road will give prompt notice as per car demurrage rule 2-b-1, and explanations thereto.”

It is shown by the evidence that the notice required by this rule was given. It is claimed that this rule is to be read in the light of the American Railway Association interpretations. It is claimed by the defendants that the evidence fails to show that these interpretations were on file with the state commission and the interstate commission. We find, however, that under the stipulation with reference to the evidence of R. R. Harris, superintendent of freight transportation, and the letters signed by him in pursuance of such stipulation, it fairly appears that the interpretations were on file with both commissions. What the effect of the interpretations would be if they were not on file need not be considered in view of our finding from the evidence that they were on file. Having been approved by both commissions and being on file with them, we find that they are to be read with the rules as the law governing the case. The interpretation provides:

“It also applies to cars held on a carrier line within a switching district, consigned to a point on the switching line within such district, which can not be received on account of disability of consignee. The carrier line must in all cases give notice in writing to the consignee of all cars so held. Time will be computed in accordance with Rule 3 (b) following.”

No question is made in the case as to the computation of the time of the demurrage at the rate of one dollar per day for each day after the expiration of the free time allowance.

We think that these rules and the interpretations cover this case and that the plaintiff is entitled to recover. The demurrage is not to be looked upon entirely as a penalty, but it is rather in the nature of a rental for the use of cars for storage during the time that consignee is unable to care for their contents. This is not only a just provision but it has a tendency to make consignees diligent in unloading and releasing cars for use. As was said in the case of *B. & O. R. R. Co. v. Luella Coal & Coke Co.*, 81 S. E., 1044:

“The law imposes upon railroad companies the duty of supplying the shipping public with prompt and proper service. They are bound to furnish cars and if the owner of goods shipped does not perform his duty in unloading within a reasonable time the public, as well as the carrier, may be greatly inconvenienced.”

The extent to which the Interstate Commerce Commission and the courts as well have upheld the demurrage charge is illustrated by the case of *Swift & Co. v. Hocking Valley Railway Co.*, 93 O. S., 104, and the cases cited in the opinion in that case. A case very much in point is that of *New Jersey Zinc Co. v. Central Railroad Company of New Jersey*, 36 Interstate Commerce Commission Reports, 289, decided October 12, 1915.

We hold that the court was in error in finding for the defendants upon the four cars in question, and the judgment of the court of common pleas will therefore be reversed. Upon the undisputed facts disclosed by the evidence this court will proceed to enter the judgment that should have been entered in the common pleas court, in favor of the plaintiff and against the defendants for the full amount of the claim.

RICHARDS, J., and KINKADE, J., concur.

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**HOLDER OF AN EQUITABLE TITLE NOT PROTECTED
AGAINST PRIOR EQUITIES.**

Court of Appeals for Mahoning County.

JAMES L. SAUSE v. CATHERINE WARD.

Decided, October Term, 1917.

Option to Sell Real Estate—Holder of, not Protected Against a Bona Fide Purchaser Without Notice—Specific Performance May be Enforced by the Holder of the Senior Equitable Title, But not Against a Junior Holder of Such Title—When Holder of an Option Acquires the Equitable Title.

1. A party having an equitable title to real estate, and not the legal title, is not protected as a *bona fide* purchaser without notice of prior equities. In order to be protected against prior equities he must have acquired the legal title and parted with the consideration therefor prior to notice.
2. The senior equitable owner of real estate, by virtue of a binding contract for the conveyance to him of such property, may enforce the specific performance of his contract in a court of equity against both the party having the legal title and a party holding a like junior equitable title, although the latter was acquired without notice of the prior equitable title.
3. A written optional contract for a nominal consideration given by the owner to sell his real estate is not a sale thereof, but only a standing offer to sell to the person and at the price named within the time stated in the contract, and the optionee does not acquire any title to the real estate unless he accepts the offer prior to its expiration.
4. After the offer has been accepted by the optionee the contract is binding upon both parties, and he has the equitable title thereto.

Henderson, Wickham & Maiden, for plaintiff.

Fillius & Fillius, contra.

POLLOCK, J.

This action comes into this court on appeal. The plaintiff claims that he entered into a contract with the defendant, Catherine Ward, for the sale to him of a certain tract of real estate which is described in the petition; that upon demand

she refused to convey this property to him as the contract required; that afterwards she conveyed the property to her co-defendants, said defendants accepting said deed with full knowledge of the equities of plaintiff, and he asks that the defendants be required to reconvey the property to him.

On November 15th, 1916, it is alleged Catherine Ward was the owner of the tract of land described in the petition; that on that date she entered into a written contract with the plaintiff by which, for the consideration of one dollar, she gave to plaintiff the right to sell this property as her agent for the sum of ten thousand dollars. This contract was to continue for six months from its date, and for such further period as might elapse prior to a revocation in writing by said first party. The contract also contained the provision that Sause should have the option to purchase said property, at the price above stated, at any time during the life of the contract.

After entering into this contract, Sause endeavored to sell the property until about the 13th day of February, 1917, on which date Catherine Ward, through her co-defendant, G. R. Purdun, as her agent, sold the property to the other co-defendant, Isaac R. Howells, and entered into a written agreement therefor; said Howells paying upon the purchase price \$1,000.

The testimony shows that Purdun had knowledge of the contract with Sause, but there is no testimony showing that Purdun had any other interest in the sale of this property except to act as agent for Miss Ward; and the testimony does not show that Howells had any notice or knowledge of the contract with Sause at the time he entered into this written contract with Miss Ward.

Afterwards, on March 20th, 1917, Miss Ward conveyed this property by warranty deed, in accordance with her contract, to Howells. After February 13th, and before March 20th, 1917, Sause elected to become the purchaser of this property under the option contained in his contract with Miss Ward, and notified her of that fact. She refused to convey the property to Sause.

The testimony shows that Sause at that time knew that she had entered into a contract for the sale of this property with

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Howells. At that time he notified Miss Ward that he was ready and willing to comply with the conditions of the contract, and demanded that she convey the property to him by proper deed. Sause did not make any tender of the purchase money for the reason that Miss Ward positively refused to carry out the agreement.

After electing to purchase this property and notifying Miss Ward, and before the deed was made conveying the property to Howells, Sause notified Howells, of his interest in the property, by showing him his contract with Miss Ward, and informing him that he had elected to purchase the property under the option in the contract.

Under these facts the question arises whether Sause has a right to a decree of specific performance, and an order requiring Howells to convey this property to him, the purchase money to be used to protect the rights of Howells.

Howells, at the time he was notified of the optional contract of Sause, had a written contract of sale of this property, and had paid thereon \$1,000, but did not have the legal title, only a written contract capable of being enforced in a court of equity compelling specific performance.

A party having only an equitable title to real estate, and not the legal title, is not protected as a *bona fide* purchaser without notice of prior equities. In order to be protected against prior equities he must have acquired the legal title and parted with the consideration therefor prior to notice. *Elstner v. Fife*, 32 O. S., 358; *Brinton v. Scull & Johnson*, 55 N. J. Eq., 3 (5 Atl., 843); *Dean v. Anderson*, 34 N. J. Eq., 496.

Between parties holding equitable titles to real estate, the one having the prior equity can enforce in a court of equity the specific performance of the contract by his grantor, against the party holding the junior equitable title. *Woods et al v. Dille et al*, 11 Ohio, 455; *Anketel et al v. Converse et al*, 17 O. S., 21.

Whether Sause or Howells has the prior equity to this land depends upon when Sause first acquired an equitable interest.

The written contract entered into between Miss Ward and Sause is as follows, so far as it refers to the question now before us:

“* * * for and in consideration of the sum of \$1, the receipt of which is hereby acknowledged by said party, the said first party has this day placed in the hands of the said second party the property described in the reverse side hereof, and does hereby constitute and appoint the said second party, her agent, with the exclusive right to sell said property for the sum of \$10,000, or such sums of money as may hereafter be agreed upon, the purchase price to be paid as follows:

“* * * this agreement shall be in force for six months from its date and for such further period as may elapse prior to revocation in writing by said first party; the said second party shall have the option to purchase said property at the price above stated at any time during the life of this contract.”

This is a contract of agency with the further provision that the agent at his option may become the purchaser. Before Sause had made a sale of this property to anyone or had elected to become the purchaser himself, Howells acquired an equitable interest in the property. Whether Sause had a prior equitable title in this property depends upon the legal effect of his optional contract given by Miss Ward to him to purchase the real estate within the life of the contract at the price named therein.

A written optional contract for a nominal consideration given by the owner to sell his real estate, is not a sale thereof, but only a standing offer to sell to the person and at the price named therein, if accepted within the time stated in the optional contract. The option confers no right to the optionee in the real estate but it is only a sale of a right to him to become the purchaser upon the acceptance thereof within the time stated. Until the acceptance of the offer according to the terms thereof, it does not ripen into a sale of the real estate or become a completed contract for the sale thereof between the parties. It is only after the optionee has accepted the option that he becomes the equitable owner of the property, and can compel specific performance of the contract in a court of equity. *Bostwick et al v. Hess et al*, 80 Ill., 138; *Willard v. Taylor*, U. S., 74-77 (19 L. Ed., 5010); *Barnes v. Rea et al*, 119 Pa., 279 (68 Atl., 836); *Hopwood v. McCausland*, 94 N.

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W., 469; *Knott v. Thomas*, 180 S. W., 1114; *Western Security Co. v. Atlee*, 151 N. W., 56.

This contract gave Sause the right to convey the equitable title to some one else, or to become the equitable owner himself, but it did not convey any title to the land. The contract was not a sale of the land, but an agency to Sause to sell the property and an option to him to become the purchaser of it. After his election to become the purchaser under this option, he had the equitable title, and either he or Miss Ward could have asserted it against the other in an action for specific performance.

As Howells' equitable ownership is prior to the time that Sause notified Miss Ward of his election to purchase the property under the option, it follows that Sause is not entitled to specific performance in this action, and his petition is dismissed.

Exceptions noted.

METCALFE, J., and FARR, J., concur.

INSURANCE IN FOREIGN COMPANIES FAILING TO COMPLY WITH STATUTORY PROVISIONS.

Court of Appeals for Lucas County.

ADOLPH BRAND v. MICHAEL MURRAY.

Decided, December 23, 1916.

Insurance—Contracts of, Not Rendered Void—Where in Foreign Companies Failing to Comply With Statutory Regulations.

Although foreign insurance corporations doing business in this state, before complying with certain regulations designated in the statutes, are subjected to certain penalties, a contract of insurance effected by them is not void.

C. S. Curtis, for plaintiff in error.

Lawton & Saalfeld and J. I. O'Connor, contra.

CHITTENDEN, J.

This action was begun in the city and justice court by the defendants in error to recover a judgment against Adolph Brand because of moneys advanced by them for insurance premiums upon certain policies of accident and life insurance. The amount claimed was \$207.92, for which sum judgment was rendered. Error was prosecuted to the common pleas court where the judgment was affirmed; whereupon proceedings in error were prosecuted in this court. This action has been considered heretofore by this court upon certain features of the case that were then disposed of.

The policies were issued by the General Accident & Assurance Corporation, Limited, of Perth, Scotland.

The principal error urged before this court is that the plaintiffs failed to make proof of compliance by the insurance company with the laws of Ohio regulating the transaction of business in this state by foreign insurance corporations. It is also claimed that there was a failure to prove that the plaintiffs were properly authorized to act as insurance agents for this company. The bill of exceptions is in narrative form and it is not entirely clear whether the plaintiffs, in all respects, had complied with the law providing for the authorization of insurance agents to act for foreign insurance companies. The only evidence as to whether or not the insurance company had complied with the laws of the state is a letter received by the attorney for the defendant, from the Secretary of State, in which it is stated that a search of the records of that office failed to disclose a corporation of the name of the General Accident, Fire & Assurance Corporation, Limited.

The defense is based, necessarily, upon the proposition that if the insurance company had not complied with the laws of the state, any policies issued by it would be void and that, therefore, there was no obligation upon the part of the assured to pay premiums. The premiums for which suit is brought accrued during the years 1911, 1912, 1913 and 1914, and aggregate \$352.50. Payments were made upon the premiums at various times during those years, amounting to \$175., leaving a balance

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of \$177.50, which, with interest, is claimed to amount to the sum sued for. The policies for which these premiums were charged had all expired by their own limitation, except perhaps the last policies, and those had substantially run the length of time for which they were written.

Our attention has been called to no statute which provides that policies shall be void that are written by foreign insurance companies that have not complied with the laws of this state. The Generally Assembly seems to have relied upon the enforcement of the laws by the imposition of the penalties provided for a violation thereof.

The general rule of law applied throughout this country seems to be that, although foreign corporations doing business in the state, except after complying with certain regulations designated in the statutes, are subjected to certain penalties, a contract of insurance effected by them is not ordinarily void. 14 R. C. L., p. 866, Section 37. And we think that is the rule that the Supreme Court of this state has adopted. *Union Mutual Life Insurance Co. v. McMillen*, 24 Ohio St., 67; *Newburg Petroleum Co. v. Weare*, 27 Ohio St., 343. See also, 22 Cyc., 1391; *Toledo Traction, L. & P. Co. v. Smith*, 205 Fed., 643, 652.

During all the time that these policies were in force had the insured met with a loss covered by the terms of the policy, he might have recovered in an action against the company and that company would not be permitted to set up as a defense to such action that it had not complied with the laws of this state. Having had valid insurance, therefore, under these policies, notwithstanding the failure of the company to comply with the laws of this state, the insured, after having accepted the insurance provided by the policies and retained the same during their life, will not be permitted to set up a defense of a failure on the part of the company to comply with the requirements of the statute, to defeat an action brought to recover the premiums earned.

The bill of exceptions does not perhaps show express authority granted by the defendant to the plaintiffs to pay the amount of the premiums to the insurance company, but it is fairly inferable from the evidence that the defendant acquiesced

in such payments and from time to time paid to the plaintiffs various sums to be credited upon the amounts so advanced by them to the insurance company. The evidence is ample to show the right of the plaintiffs to maintain this action. The partnership name of the plaintiffs containing therein the names of all the individual partners, there is not shown to have been any violation of law upon their part in failing to have their partnership registered in the office of the clerk of courts.

The plaintiff in error also complains that the court erred in the admission of evidence upon certain items of account not set forth in the bill of particulars. We are unable to find from the record that the justice committed any prejudicial error in the reception of evidence.

Finding no prejudicial error apparent in the record, the judgment will be affirmed.

RICHARDS, J., and KINKADE, J., concur.

TITLE PASSED BY DELIVERY TO CARRIER.

Court of Appeals for Erie County.

THE INDEPENDENT SILO COMPANY V. MILTON A. HESS ET AL.

Decided, April 7, 1917.

Sales—Determination as to When Property in Goods Passed to the Buyer—Delivery to Common Carrier, Consigned to Buyer Pursuant to Written Contract, Passed Title, When.

A written order given by a purchaser on a printed blank, for a certain described silo at a fixed price with three per cent. discount for cash within fifteen days after arrival of silo, or settlement to be made by a bankable note, and directing that the goods be delivered by the seller to a common carrier, constitutes, on the acceptance of the order, a completed contract of sale; and, on delivery of the goods by the seller, to the common carrier, consigned to the purchaser at his address, the title passes to the purchaser.

H. L. Peeke, for plaintiff in error.

Malcolm Kelly, contra.

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RICHARDS, J.

Error to the court of common pleas.

The controversy in this case arises over the claims of the respective parties to the proceeds of a certain silo, and is to be resolved by a determination as to whether the title to the same had passed from the plaintiff to one Frank Lowry. The defendants, Milton A. Hess and Mary A. King, are attaching creditors of said Lowry, and the defendant, George Hasenpflug, is the receiver of said Lowry.

On May 12, 1916, Frank Lowry gave an order on a printed blank of the plaintiff company, which directed said company to ship to him as purchaser a certain described Independent Silo complete with anchors and roof frame, for which he agreed to pay \$201, less agent's commission of ten per cent., and on the following terms: Three per cent. discount allowed for cash within fifteen days after arrival of silo, or settlement to be made by bankable note due September 1, 1917, bearing interest at six per cent. from September 1, 1916. The contract of purchase also provided that certain provisions on the back thereof were made part of the contract, and among the provisions on the back is the following:

"The Independent Silo Company agrees to deliver the goods to a common carrier, with reasonable promptness after receipt of this order in the regular course of business, but will not be responsible for loss or delay occasioned by strikes, fires, accidents or causes of any character beyond its control."

Pursuant to this order the plaintiff shipped the several parts constituting the silo as described in the contract, from its factory in Minnesota, consigned to Frank Lowry at Berlin Heights, Ohio, delivering the same to a common carrier by which they were transported to Berlin Heights, and the goods were received by Lowry and remained in his possession until seized in attachment by the attaching creditors already named. The claims of the attaching creditors exceed very largely the value of the attached property, the judgment in favor of Mary A. King being in excess of \$2,300, and the judgment in favor of Milton A. Hess being in excess of \$1,000.

The transaction between Lowry and the plaintiff constitutes an ordinary bargain and sale and comes within the plain language of General Code, Section 8399, which prescribes the rules for ascertaining the intention of parties as to the time at which the property in goods shall pass to the buyer when a different intention does not appear in the contract of the parties. Rule 4, sub-divisions 1 and 2 of that section reads as follows:

“Rule 4. (1) When there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

“(2) When in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee, whether named by the buyer or not, for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in the next following section. This presumption is applicable, although by the terms of the contract the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words collect on delivery or their equivalents.”

It will be noticed that the last subdivision provides certain exceptions which are stated in the next rule and in the section of the General Code next following, but those exceptions are not applicable to the case at bar for the reason that subdivision 1 of Section 8400, General Code, only provides for cases where the seller expressly reserves the right of possession of property sold until the conditions have been fulfilled, and no such reservation existed in the case at bar. Subdivision 2 of the section last cited is applicable only to cases where the bill of lading is made to the order of the seller or his agent, which is not this case. And subdivision 3 is applicable to cases where the seller retains possession of the bill of lading, which is not this case. Neither are the provisions of Subdivision 4 of the General Code just cited applicable to the case under consideration.

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It is insisted, however, by counsel for the Independent Silo Company that the provisions of Section 8422, General Code, are controlling in this case. That section provides substantially that unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions. The difficulty with applying that statute to the case under consideration is that the parties did otherwise agree as evidenced by the written order. Under the terms of that order a delivery of the various parts constituting the silo to the common carrier in Minnesota, the goods being consigned to the purchaser, constituted a delivery to him, and the title thereupon passed to the purchaser. It was in effect a sale on credit and the purchaser had from the time the goods were delivered to the common carrier until they actually arrived in Berlin Heights and had been inspected by him and found to be in accordance with the order, in which to execute and deliver to the plaintiff a bankable note, or if the purchaser chose to pay cash, he was entitled to a discount of three per cent. and fifteen days in which to make that payment. We must, therefore, hold the sale to be in effect a sale on credit. The silo company trusted the purchaser to furnish either a bankable note or to make payment within fifteen days, and made an unconditional and absolute delivery of the goods when the same were delivered to the common carrier in Minnesota. There was then neither a condition precedent nor a concurrent condition which would prevent the immediate passing of the title to the purchaser on delivery of the goods to the common carrier.

Our attention is called to the case of *Bonham v. Hamilton*, 66 O. S., 82, and an argument is made, based on the authority of this case, that the title had not passed from the silo company. This case was decided before the adoption of the uniform sales law; but we find nothing in the conclusion which we have reached that is inconsistent with the law as announced in the case just cited. That case was a sale by an administrator and there had been no delivery of the goods sold, and there was an express stipulation that the transaction was not to be a sale until the sureties had been approved by the administrator. This, of course, was, under the law, no sale until the conditions expressly stipulated for had been complied with, and, the administrator

declining to approve the sureties, the title remained in the administrator.

On the trial of the case in the court of common pleas a jury was waived and the judge, after due consideration, rendered judgment for the defendants. For the reasons given, the judgment so rendered will be affirmed.

CHITTENDEN, J., and KINKADE, J., concur.

THE AUTOMOBILE UNDER THE EXEMPTION STATUTE.

Court of Appeals for Hamilton County.

THE JOHNSON ELECTRIC SUPPLY COMPANY V. WALTER SPENCE.

Decided, 1917.

Automobile Not Exempt From Execution—Is Not an Implement and Can Not be Claimed in Lieu of Homestead—Section 11725.

1. An automobile as used in this case is not an "implement" within the meaning of the statute exempting certain articles from levy and execution.
2. Nor can an automobile be claimed as exempt in lieu of a homestead where the owner and his wife were the owners of a homestead and living therein at the time the levy was made, notwithstanding the property was mortgaged for more than it was worth and was conveyed to one of the mortgagees after the levy was made.

H. J. Siebenthaler, for plaintiff in error.

Galvin & Bauer, contra.

PER CURIAM.

The question to be determined in this case is whether or not an automobile, of the type Hudson, 1911, is specifically exempt from execution in favor of the defendant in error, who was a married man at the head of a family and claimed he was not the owner of a homestead.

The judgment was rendered against the defendant in error in the sum of \$114.68, and at the time the judgment was rendered

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he and his wife were living in a home consisting of a house and lot in the city of St. Bernard, which was encumbered by mortgages for more than its value. After the judgment was rendered and after the execution was levied upon the automobile in question, the defendant and his wife conveyed to one of the mortgagees the real estate in which they lived. Defendant thereupon claimed that the automobile was specifically exempt from execution under Section 11725, Subdivision 5 of the General Code. His calling was that of an electrician, and in an affidavit filed in the trial court, claiming the automobile as exempt from levy and execution, he set out that the automobile was necessary to enable him to carry on his trade or occupation, and that the value of the machine was not more than \$100.

Subdivision 5 of Section 11725, General Code, provides that—

“Every person who has a family,” etc., “may hold * * *.

“5. One sewing machine, one knitting machine, and the tools and implements of the debtor necessary for carrying on his or her trade or business, whether mechanical or agricultural, to be selected by him or her, not exceeding one hundred dollars in value.”

It is the claim of defendant in error that this automobile is an implement necessary for carrying on his trade or business.

We do not think that an automobile as used by this debtor partly for carrying him from place to place on business, at times carrying his tools and materials, and partly used for himself and family for pleasure comes within the contemplation of the statute as an implement, and therefore it is not exempt from levy and execution under Section 11725.

Under Section 11726, General Code, a person who is the head of a family and is engaged in agriculture, may hold exempt from execution:

“One horse, or one yoke of cattle with the necessary gearing therefor, and one wagon.”

But the defendant in this case is not a farmer, and these sections relating to exemptions must be strictly construed.

He can not claim this automobile is exempt in lieu of a homestead under Section 11738, General Code, because at the time

that the judgment was rendered and the levy made on the automobile he and his wife were the owners of a homestead and living therein, although the same was encumbered by mortgages for more than its value. The status of the parties and their right to claim the property in lieu of a homestead are to be determined at the time of the judgment and levy. *Nixon v. Vandyke*, 2 C. C., 63. The defendant and his wife having conveyed their homestead after the levy was made on the automobile, they can not claim under this decision to hold it in lieu of a homestead, because the right to claim the property was fixed as of the date of the levy, at which time they did own a homestead.

For the reasons stated we conclude that the judgment of the common pleas court should be reversed.

**DETERMINATION OF THE EFFECT OF ELECTION BY A
WIDOW NOT TO TAKE.**

Court of Appeals for Knox County.

CLIFFORD BLOCHER ET AL V. IDA BLOCHER TRICK ET AL.

Decided, October 25, 1917.

Wills—Trust Created in Favor of Widow of Testator—Renunciation by Her of Provision for Her Benefit—Accelerates a Division of the Property Among the Devisees.

Where a widow elects not to take under the will of her deceased husband, which creates a trust in her favor, her renunciation, in the absence of any other disposition of the property covered by the said trust, accelerates the enjoyment of the property by the remaindermen, subject to the dower interest of the widow therein but without terminating another independent trust created by said will.

Harry W. Koons, for plaintiff.

L. C. Stillwell, contra.

HOUCK, J.

This is an action in partition which was originally commenced in the common pleas court of this county, and is here on appeal from the judgment of that court.

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While the action is one in partition, yet the question for determination by this court is as to the true construction of items 2 and 3 of the last will and testament of John M. Blocher, deceased. These items read:

"Item 2. I desire the home property, business building and flats located at corner of High and Sandusky streets, in Mt. Vernon, Ohio, to remain in my name, as a part of my estate, for a period of ten years, unless my wife should die sooner, and desire that the same shall be managed by my executors hereinafter named, and from the proceeds arising therefrom, should the same be sufficient, and if not then from any property that I may leave, I direct my said executors to pay to my said wife, Malinda Blocher, the sum of three hundred dollars each and every year during her natural life, the same to be paid monthly, the same to be in lieu of her dower interest and distributive share in my estate.

"Item 3. At the end of said ten years, or at the death of my said wife, should she die before that time, I direct that my said executors shall sell said real estate, and from the proceeds arising therefrom divide the same share and share alike among my living children, or those that are living now, namely, Harry C. Blocher, Ida Blocher Trick, Bird Dixon, Clifford Blocher and Grace Rawlinson, and should any of said children die before the disposition of said property, then I desire that the children of any child so dying shall have the share of the child dying. However, it is my will, and I hereby direct that the share from the proceeds of said property going to my son Harry C. Blocher shall be kept and managed by said executors, and the proceeds from the same be paid to my said son, and at the death of my said son Harry C. Blocher then I direct that said executors shall pay the said amount so held in trust for Harry C. Blocher to his two children share and share alike."

So far as the facts in this case are concerned they were submitted on an agreed statement of facts entered into by and between the parties to the suit. We think it necessary to refer to but two of them, because for a proper determination of this case it is not necessary to consider more than these two, namely, that Malinda Blocher, the widow of John M. Blocher, elected not to take under the last will and testament of her said husband, and, second, that all of the allegations in the petition of plaintiff are true.

The first question to be determined is with reference to the proper construction to be placed upon item 2 of said will, in view of the election of the widow of John M. Blocher not to take under the provisions of his will. We must determine whether or not the renunciation of the widow has the effect of accelerating the enjoyment of the remainder-men.

It was a legal right extended to Malinda Blocher, the widow of John M. Blocher, to refuse to take under the provisions of his will, and in our judgment this renunciation on the part of the widow terminated the trust created in item 2 of the last will and testament of John M. Blocher, deceased, and such act on the part of the said widow accelerated the enjoyment of the devisees, because in the absence of any other disposition the property described in said item 2 passed intestate to the children of the testator, and said children took the property devised to them in item 2 as intestate property, subject, however, to the dower interest of the surviving widow therein.

The next question that arises is as to whether or not the claim of counsel for Harry C. Blocher is well taken, namely, that by reason of the termination of the trust created in item 2, by the failure of the widow to take under the will, that thereby the trust created for Harry C. Blocher also becomes inoperative. To this doctrine and theory we can not subscribe. The trust estate created for the benefit of Harry C. Blocher was independent and separate from any other provision contained in the will of John M. Blocher, and, as a matter of law, we find the trust estate created therein is not terminated.

Thus it must follow, from what we have already said, that in our judgment the plaintiffs are entitled to the relief prayed for in their petition, and partition is hereby granted, and this cause is hereby remanded to the common pleas court for execution of the judgment herein entered, and for further proceedings as required by law.

POWELL, J., and SHIELDS, J., concur.

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**PROVISIONS OF SECTION 12001 OBSOLETE AS TO WIVES
MARRIED SINCE 1887.**

Court of Appeals for Hamilton County.

FRANK A. DILLINGHAM V. VIOLA DILLINGHAM ET AL.

Decided, December 3, 1917.

Husband and Wife—No Authority for Appointment of a Receiver—To Preserve the Property of a Married Woman as Against Her Husband—Construction of the Married Woman's Act—Jurisdiction of the Court of Domestic Relations.

Section 12001, providing for an injunction against a husband upon petition of his wife, restraining him from wasting or squandering or converting to his own use property held by her and him in his and her own right, has no application to women married since the passage of the married woman's act of 1887. As to such women said act is obsolete, and an order appointing a receiver to manage and control the separate property of a woman married since 1887 is without force or effect.

Dickerson, Black & Dickerson and J. W. Peck, for plaintiff in error.

Littleford, James, Ballard & Frost, contra.

GORMAN, J.

The defendant in error on April 25, 1917, commenced an action in the Common Pleas Court of Hamilton County against the plaintiff in error, Frank A. Dillingham, her husband, making the Market National Bank, Louis G. Pochat, the Security Savings Bank & Safe Deposit Company and Anna M. Maloney parties defendant. Her action was brought under Section 12001, General Code, under favor of which section she alleged in her petition that she and Frank A. Dillingham were married on November 10, 1908; that she is entitled in her own right and is the owner of a part of and share in the business carried on in the name of Frank A. Dillingham in the city of Cincinnati, which business is that of the manufacture and sale of a proprietary medicine called "Plant Juice," which is now and has

been widely and extensively sold in drug stores throughout the entire United States. She further says that her husband, from habitual intemperance and profligate habits is about to waste and squander the said property and business and the profits thereof, to a part of and a share in which she is entitled in her own right; and that he is proceeding to and is about to proceed to fraudulently convert the entire business and profits therefrom to his own use for the purpose of placing them beyond her reach and depriving her of their benefit. She further averred in her petition that the other defendants, the Market National Bank and others, have in their possession and under their control certain moneys and property belonging to said business, to a part of which she is entitled in her own right. She prays in her petition that a temporary restraining order issue restraining the defendant from disposing of or otherwise interfering with the said business, its moneys or credits, choses in action or property, and restraining the defendant from in any way transferring, delivering or turning over to any person whomsoever any money property or security in their hands in the name of or being held for Frank A. Dillingham, or the Dillingham business, or the Plant Juice business. She further prays for a restraining order against the other defendants from permitting Dillingham or any other person from having access to any safe deposit box in the name of Frank A. Dillingham or the Dillingham business or the Plant Juice business, until further order of court. And she prays for a further restraining order restraining Anna M. Maloney from permitting Frank A. Dillingham to in any wise interfere with or dispose of the said business or any of the property, moneys, credits and choses in action of the said business, and from paying over or delivering to said Dillingham any moneys or the equivalent thereof arising from the proceeds or profits of the above described business. And she further prays that upon a final hearing the temporary restraining order asked for may be made permanent. She further prays the court to appoint a receiver to manage and control the above described business for the benefit of herself, and prays the court to make such other order in the premises as it deems just and proper.

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Upon the filing of this petition the court made an order dispensing with the giving of notice to the defendant, as required by the rules of court upon the application for a restraining order, upon the grounds that the giving of the notice would defeat the purpose of the injunction. Defendant, Dillingham, was not in the jurisdiction of the court, and notice was published for him according to the law.

Upon the day of the filing of the petition a temporary restraining order was issued as prayed for in the petition, and the business carried on in the name of Frank A. Dillingham was thus prevented from being sold, disposed of or carried on.

Two days after the filing of the petition, without the presence of the defendant and without any service being made upon him, the court of common pleas appointed a receiver of the business described in the petition, and in the entry appointing the receiver it was recited that Messrs. W. W. Dickerson and Robert Black appeared in court as the attorneys of Frank A. Dillingham. The court fixed the amount of the receiver's bond at \$30,000 and ordered the entire business and assets of Dillingham to be placed in the hands of the receiver and directed the receiver to carry on the business and employ the necessary help and purchase the necessary material therefor, and to do all things necessary to prosecute the business. Publication of constructive notice for Dillingham was then made, as required by law.

Counsel for Dillingham filed a petition in error in the court of appeals, from the judgment appointing the receiver, said cause being numbered on the docket of this court No. 1101. Upon application for a stay of execution in this court an order was made staying the appointment of the receiver upon the defendant Dillingham giving bond in the sum of \$50,000, and further proceedings in the common pleas court were thereupon stayed.

Thereafter in the common pleas court a hearing was had at great length. A great mass of evidence was adduced before the court, and on the 31st of July, 1917, the court reappointed Frank C. Zumstein receiver of all the business, property

and assets of the Dillingham business and of Frank A. Dillingham, and the Plant Juice business. No other relief was asked in the petition except an injunction to restrain the defendant Dillingham from disposing of the property and restraining the other defendants from permitting any of the property in their hands belonging to Dillingham to be taken and disposed of; and the further prayer for the receiver.

In the first appointment by the court of common pleas the receiver was designated as a temporary receiver; the last appointment merely provides for the appointment of a receiver without any limitation as to the time of the receivership, and without any reservation for any further order of court. The predicate upon which the court based this order for the appointment of the receiver was that Dillingham, plaintiff's husband, had been wasting and squandering and was about to waste and squander the assets and profits of the said business, one-half of which belonged to the plaintiff, by reason of habitual intemperance and profligate habits, and was proceeding to and was about to proceed to fraudulently convert the half of the said business and profits aforesaid, belonging to the plaintiff as aforesaid, to his own use for the purpose of placing them beyond the reach of the plaintiff and depriving her of their benefit. And the court further found that all of the allegations of the plaintiff's petition were true and that the plaintiff was entitled to the relief prayed for in her petition. The receiver was authorized and directed to carry on the business, employ all the necessary help, purchase all the necessary materials, and to do all things necessary to carry on and promote the business, and to take charge of all the property, and out of the profits thereof to pay one-half to the plaintiff Viola Dillingham. And all persons having any property or choses in action in their possession belonging to said Frank A. Dillingham or to the business, were directed to turn over the same to the receiver. The order was quite a sweeping one, and dispossessed Dillingham entirely of any dominion or control over the property or business, and placed it in the hands of the receiver without limit as to time, and without limit as to authority to carry on the business.

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Dillingham excepted to this order, and prosecutes error to this court in proceeding No. 1171 on the docket of this court.

We have, therefore, two error cases in this court growing out of the original litigation brought by the defendant in error.

It is unnecessary to state anything further with reference to the first case, No. 1101, inasmuch as the purpose of that proceeding was merely to stay the execution of the judgment entered in the common pleas court appointing a receiver temporarily. That proceeding, having been stayed, all the matters necessary to be considered in this error proceeding will be considered in the last proceeding brought herein, No. 1171.

It appears from the record in the case that previous to the bringing of this action in the common pleas court for the appointment of a receiver and for an injunction to restrain Dillingham from disposing of the property, the defendant in error, Viola Dillingham, brought an action in the common pleas court, in the division of the court of domestic relations, praying for alimony, against the defendant Frank A. Dillingham. This suit was filed in the court of domestic relations September 16, 1916, more than seven months before the commencement of this action for the appointment of a receiver. In her petition in the common pleas court, division of domestic relations, plaintiff set out, *inter alia*: that the defendant had for many years been engaged in the manufacture in the city of Cincinnati of a proprietary medicine called "Plant Juice," which is widely and extensively advertised and sold in drug stores throughout the entire United States. She averred that defendant was possessed also of large quantities of valuable stocks and bonds, and also of a very large number of extremely valuable diamonds and other personal property. She also set out in this petition for alimony that defendant had been guilty of wrongdoing in many places throughout the United States, and that he had been guilty of gross neglect of duty and that he had remained away from the plaintiff for a long time and refused to communicate with her. She further alleged that he had been guilty of habitual drunkenness for a number of years past. She averred that he had an interest in the business of the

manufacture and sale of said proprietary medicine known as Plant Juice, and that he was about to dispose of and encumber same so as to defeat her from obtaining alimony. She prayed for temporary alimony during the hearing of the cause, and for her expenses during the prosecution of this suit; and that upon a final hearing a reasonable alimony be allowed out of the property of said Frank A. Dillingham. She further asked that an injunction issue restraining Dillingham from disposing of any property or of the business known as "Plant Juice."

A temporary restraining order was issued by the judge of the court of domestic relations without bond.

In no place in the petition of the plaintiff for alimony did she aver that she had any interest in the business known as "Plant Juice," but if she does not state specifically that the business and property belonged to the husband, Frank A. Dillingham, the averments of the petition would lead one to infer that she claimed he was the owner of this business and that she had no interest therein except as the wife of Frank A. Dillingham.

The question to be determined in this case turns upon the construction and application to the facts in this case of Section 12001, General Code. That section reads as follows:

"A married woman may file a petition in the common pleas court, setting forth that from habitual intemperance, or other cause, her husband is about to waste and squander the property, legal or equitable, money, credits or choses in action, to which she is entitled in her own right, or a part thereof, or is proceeding, or about to proceed, fraudulently to convert them, or a part thereof, to his own use, for the purpose of placing them beyond her reach, and depriving her of their benefit, whereupon the court may enjoin him from disposing of, or otherwise interfering with, such property, money, credits or choses in action, appoint a receiver to manage and control them for the benefit of the wife, and also make such other order in the premises as it deems just and proper. On filing the petition, a provisional injunction also may be allowed as in other cases, with or without bond at discretion. Such petition shall be filed in the county where the petitioner resides, and the husband made a party defendant, as in the case of a petition for a divorce."

It is claimed by plaintiff in error that under this section the common pleas court has power and authority to appoint a re-

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ceiver not only for the property owned by the wife in her own right, but also for the property of the husband if the same is in any way joined with that owned by the wife.

At the outset we may say that a careful consideration of the evidence in this case satisfies us that it is not sufficient to establish the ownership of Viola Dillingham to any of the property claimed by her in the petition filed in the court of common pleas. We think the evidence is insufficient to establish her ownership and title to any of the property. The business was established by Dillingham many years ago. She claims that in 1912, at Houston, Texas, her husband orally told her that he would give her a half interest in the business. It is claimed that this statement of the husband was heard by a man by the name of Briscoe, who was acting in the capacity of a private secretary for Mrs. Dillingham. Briscoe on the witness stand testified that he heard this conversation; but the facts and circumstances of his employment and service with the Dillinghams would lead us to believe that he was not present at the time the wife says this conversation took place. Furthermore, it was shown on the trial of the case that Briscoe had been convicted twice, at least, in the courts; and upon being questioned as to his conviction he denied it. But the proof adduced by counsel for Dillingham established his conviction. Pending the hearing of the case after this proof was adduced Briscoe fled the state and has not since been heard from. More than a year after the time when the wife claims that Dillingham gave her a half interest in this property, she wrote him a letter while he was in San Francisco. This letter is dated March 17, 1913. In this letter, among other things, she says:

"This is another holiday, but holidays come and holidays go and I never know anything about them. It is getting to be rather a treadmill sort of thing, not that I mind that in the least if I was getting anything out of it. I like to work and would not mind the daily grind, also evenings and Sundays, too, if I had any sort of share in it. Of course I do not know the workings of your brain, but it seems to me the many protestations of your love, etc., lack any convincing weight. I am giving every minute of my waking hours to the business; it seems only fair that I should share equally."

The husband denied that he ever had such conversation with her as that testified to by her, and the evidence disclosed that she never drew any money from the business, except upon Dillingham's order and Dillingham's checks. She had nothing to do with establishing the business; none of her individual or private property or funds went into the business, and the conduct of Dillingham and the conduct of the business, the testimony of numerous witnesses, the letters that passed between the parties, and the conduct of Mrs. Dillingham herself appear to us to conclusively rebut the claim that she was given an interest in this business.

But, assuming for the purposes of the case that the facts in the case do establish that she was given an interest in this business, then we are to consider whether or not under Section 12001 the court of common pleas was authorized and warranted in appointing a receiver for this entire business because the wife was an owner of one-half interest therein.

It will be interesting to trace the history of Section 12001, General Code. This section appears under the subdivision of Divorce and Alimony, Chapter 3, Division VII, Title IV, of the General Code of Ohio, and it has been placed in this chapter and subdivision since the codification in 1880. It appears to have been considered by the codifier, and also by the Legislature when it passed this enactment, as a proper proceeding under the chapter for divorce and alimony.

Under the Constitution in 1802 there was no provision made for divorce and alimony, and it was the practice during the early days of the Legislature for that body to pass a special act providing for the divorce of married people. The Supreme Court in the case of *Bingham v. Miller*, 17 Ohio, 445, finally called a halt on this practice by holding that the granting of divorce by the Legislature was a usurpation of judicial functions by that body.

On January 6, 1824 (22 O. L., 341), the General Assembly passed an act concerning divorce and alimony and vested in the Supreme Court of the state sole jurisdiction of granting divorces when any cause existed for a divorce as mentioned in that act. There was also a provision made in the act for the custody and

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maintenance of children and the allowance of alimony in a proper case. There was no provision for a suit for alimony independent of an action for divorce.

On March 6, 1840 (38 O. L.), the Legislature passed another act concerning divorce and alimony, and repealed the act of January 6, 1824. In this latter act of 1840 the Supreme Court was again given sole cognizance of granting divorces for the causes enumerated in the act; but there was no provision made for alimony independent of the action for divorce and alimony. In other words, alimony could be granted in a divorce proceeding but not in a separate proceeding.

On March 2, 1846, the Legislature passed an act to amend the act concerning divorce and alimony, passed March 6, 1840 (44 O. L., 115). This act was the original progenitor of Section 12001, General Code. It reads as follows:

"Be it Enacted by the General Assembly of the State of Ohio, That any married woman, by her next friend, may file her bill in chancery in the Supreme Court, or court of common pleas, setting forth that her husband, from habitual intemperance, or any other cause, *is about to waste and squander the property to which he is entitled in her right*" (underscoring by court). "or any part thereof, or is proceeding fraudulently to convert the same to his own use, for the purpose of placing it beyond her reach, and depriving her of the benefit thereof; and the court, upon the hearing of the case, may enjoin the husband from disposing of, or otherwise interfering with such property, and may appoint a receiver, to manage and control the same, for the benefit of the wife; and may also make such other order in the premises as they may deem just and proper."

Some slight changes have been made in the verbiage of this act in the codification of 1880, the most important change being that whereas in the original act the property mentioned is that "*to which he is entitled in her right*," by the codification of 1880 that language is changed so as to read, "the property, legal or equitable, money, credits or choses in action, *to which she is entitled in her own right*."

Manifestly the purpose of this act of 1846 was to protect a married woman in the enjoyment of her own separate property. The rule of the common law at that time prevailed in Ohio, that

a woman upon her marriage lost her entire entity; her existence and her life were merged in that of her husband. He was everything; she was nothing. She lost her name; all of the personal property which she had in her own right, and her own name became his except choses in action, and they became his whenever he saw fit to reduce them to his possession. She had no right to bring an action in her own name except as provided by statute. She could not enter into any contractual relations. She could not sell or dispose of her property without her husband's consent and without him joining with her. Her personal earnings belonged to her husband and he could subject them to his possession.

But this had been the state of the law from time immemorial. Not only did her person belong to her husband, but all her property. She was as much a slave as though he had bought and paid for her and owned her absolutely, and all her belongings.

The Legislature from time to time, during these middle and dark ages of Ohio, was endeavoring to ameliorate to some degree the condition of the married woman; and it is evident that the purpose of this legislation was to give her some benefit and enjoyment of her separate estate—the property that came to her either by inheritance or gift, or by her own earnings when she was a *femme sole*—and to prevent an intemperate and wasteful husband of dissipating her property and depriving her and her children from the benefits thereof. She could not bring a suit in her own name at that time, as the act plainly shows, but it would have to be brought by her next friend; and it had to be brought in chancery, in the Supreme Court or the court of common pleas. No one will question the justice and equity of this humane provision of the Legislature for the protection of the married woman. This act continued to be the law down to the present time, with the exception that now she may bring an action in her own name and is not obliged to resort to her next friend.

In 1851, March 24 (49 O. L., 102), jurisdiction was conferred upon the courts of common pleas of the state to grant alimony independent of divorce, for the several grounds set out in the act,

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and it is provided therein that the proceedings in an action for alimony shall be conducted in all respects as in cases for divorce. This is the first time courts of common pleas were given jurisdiction to hear and determine actions for alimony independent of actions for divorce.

On March 11, 1853 (51 O. L., 377), the Legislature passed an act concerning divorce and alimony, which act was to take the place of all the previous acts relating to divorce and alimony. In this act, under Section 14, is set out the provision of the act relating to a married woman bringing an action for the appointment of a receiver for her separate property. The language of Section 14 is substantially the same as the language employed in the original act, passed March 2, 1846, with this exception: it relates to property, moneys and credits to which *she is entitled in her own right*. The Legislature having changed the phraseology from the language employed in the original act as being property to which *he was entitled in her right*, recognized evidently that it was her property to which she was entitled in her own right, and related to her separate property. This act repealed all previous acts touching divorce and alimony and also the act providing for an action for a receiver of the wife's separate property; but the new act embraces not only all the matters covered by the previous legislation on the subject, but additional legislation also.

This act was again amended April 15, 1857 (54 O. L., 131). Section 14 of the original act—now Section 12001, General Code—was not changed or amended by this act.

From 1857 to 1880 there was no change made in the divorce and alimony statutes.

In 1880 the codifying commission collected all these previous provisions relating to divorce and alimony under Chapter 6, Title I, Division VII of the Revised Statutes, Sections 5689 to 5706 inclusive. In this chapter is found Section 5705, which was originally Section 14 of the act of March 11, 1853, and is Section 12001, General Code, as it now exists.

No change was made in this section from 1880 down to the present time, and the codifying commission of 1910, and the

Legislature which adopted and ratified the acts of the commission, left it substantially as it was then in force.

In 1880 when the codifying commission collected all the laws relating to divorce and alimony, it was necessary to retain Section 12001 in the General Code, because at that time a married woman could not sue or be sued in her own name; she could not hold her own property in her own name, although the Legislature at that time had made quite an advance in emancipating woman from the enthrallment of her husband.

In 1887, an act was passed which practically emancipated a woman from the control of her husband. She has since that time a right to contract and be contracted with as though unmarried; she has a right to hold in her own name and for her own use all her separate earnings acquired by her, or by inheritance, or by gift, or in any other legal manner, and is free from the rights of her husband and from his control and subjection as to all of her property. She has a right to enter into business as though unmarried, and in any manner to enter into any obligation she may desire, as though she were a *femme sole*; she can not by contract between herself and husband change the legal status of their married relations. See Sections 7996 to 8004, inclusive, General Code, Title VI, Chapter 1, Domestic Relations. The only interest he has in her property during her life is a contingent right of dower in her real estate.

The state of the law at the present time, therefore, is that the separate property of a married woman is not in possession or under control of the husband unless she sees fit to give it to him. We think the proper construction to place upon Section 12001, General Code, is that it was for the protection of married women at a time when they had no right to hold their own separate property and no right to bring an action in their own names, or to make contracts in their own names; but since the passage of the married woman's act, in 1887, there is no occasion for the use of Section 12001, except for the purpose of preserving such property of a married woman as came to her husband by marriage prior to the passage of the married woman's act of 1887. The codifying commission of 1880, and the commission of 1910, no

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doubt retained this section of the Revised Statutes in the General Code because they realized that there was at those times and there still may be cases in which a woman was married prior to 1887 and brought to her husband personal property and choses in action which was her separate property and which by marriage passed to his dominion and his possession and control; and in order to protect her in the enjoyment of her rights in those properties this section is retained in the statute laws of the state.

It has no application, in our opinion, to the cases of women who have married since the passage of the married woman's act in 1887, because since that time no condition can arise whereby an action could be brought in the court of common pleas under Section 12001, General Code, by a woman who has married since the passage of the act of 1887. So far as women who have been married since the passage of the married woman's act in 1887 are concerned, this section is obsolete and can have no application to them or their affairs. It would be unnecessary for such a woman to bring such action. In fact, she could not set out a state of facts which would confer upon the court jurisdiction to bring an action, because her property would not pass to her husband by her marriage, as it did before the passage of the married woman's act of 1887.

In the case before the court Mrs. Dillingham claims that she has separate property in a one-half interest in this business, and that this was acquired in 1912. It was not acquired by her prior to 1887, and therefore there appears to be no reason for the application of the rules laid down in Section 12001, General Code. If she has an interest in this property she may bring an action against her husband to secure this interest without having a receiver appointed. If she were a partner she could come into court and ask for a dissolution of the partnership, a winding up of the business and the appointment of a receiver to take charge of the business and sell it for the benefit of the partnership. The record does not disclose a state of facts which would warrant the court in the application of Section 12001, General Code.

We hold that this section can apply only to cases of married women whose property passed into possession of their husbands prior to the passage of the married woman's act in 1887, and whose husbands took possession of their property by virtue of the rules of common law, before the wife was emancipated from the husband.

In any event the court of common pleas was not warranted in appointing a receiver for rank A. Dillingham's property under Section 12001, General Code. There is no warrant or authority under this section for taking the husband's property out of his hands and placing it in the hands of a receiver. The only warrant and authority under that section is for the appointment of a receiver for the *wife's property*. Even if the court were authorized to appoint a receiver under Section 12001, it exceeded its authority in appointing a receiver for the entire property—the husband's property as well as that claimed by the wife.

It appears from the record in this proceeding that while this case was pending in the court of common pleas, and before the judge of the court of common pleas who heard the matter took up the consideration thereof, counsel for Dillingham, plaintiff in error, made application and motion to the court to send the cause to the judge presiding in the court of domestic relations for the reason, as he claimed, that there was at that time pending an action for alimony, and that all the relief prayed for in this case could be granted by the judge of the court of domestic relations, in the alimony case. It appears from the record that the judge refused to send the cause to the judge presiding in the court of domestic relations; and it further appears from the record that the judge who presided in the court of domestic relations was of the opinion that he had no jurisdiction to hear and determine this action.

The view we take of this matter is that the judge of the court of common pleas presiding in the court of domestic relations should have taken this case and heard and determined it. This Section, 12001 General Code, is a part of the chapter relating to divorce and alimony, and in view of the fact that the judge of the court of common pleas who presides in the court of domes-

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tic relations has jurisdiction and special authority from the Legislature to hear and determine all matters relating to divorce and alimony, this case should have been sent to that particular judge.

We think it was error on the part of the common pleas court judge who heard this case not to have sent the cause to the judge presiding in the court of domestic relations; but we are in doubt as to whether or not such error was so prejudicial as to warrant a reversal of the judgment, if there were no other errors in the record.

For the reasons above stated the judgment of the court of common pleas will be reversed.

JONES, P. J., and HAMILTON, J., concur.

**SCHOOL PROPERTY CLAIMED TO HAVE BEEN
ABANDONED.**

Court of Appeals for Knox County.

IRA WHEATON ET AL, AS MEMBERS OF THE BOARD OF EDUCATION
OF UNION TOWNSHIP, v. GEORGE H. FERENBAUGH.

Decided, October 25, 1917.

*Abandonment—Relinquishment Must be Intentional—Not Shown by
Mere Non-Use for a Period Less Than the Statute of Limitations.*

Suspension of school for a period of three years, in the school district
in which the school property involved in the instant case is lo-
cated, does not constitute abandonment on the ground of non-user.

Charles L. Bermont, Prosecuting Attorney, for plaintiff.

F. O. Levering and *P. A. Berry*, contra.

HOUCK, J.

This is an appeal case and is prosecuted to this court from the common pleas court of this county. The basis of the action is one for injunction, and was submitted to this court upon an agreed statement of facts.

We do not deem it necessary in order to decide the real question involved in this case to set out in this opinion the agreed statement of facts, as we think it sufficient to say that applying the propositions of law pertinent and applicable to the facts agreed upon, it leaves but one question to be determined by the court, which is a question of fact, namely, as to whether or not said board of education has ceased to use said premises for school purposes.

An examination of the agreed statement of facts shows that the school in the school district in which said premises are located has been suspended for about three years by the board of education, and the question for solution is, does this fact constitute such a non-user as would be held to be an abandonment of said school property for school purposes which would warrant, justify and authorize the defendant to take possession of said premises?

Abandonment, as we understand it, means an intentional relinquishment of a known right, and to constitute abandonment there must be an intent and an actual failure to use. Non-user alone, at least short of the period of the statute of limitations, unless otherwise provided by contract, is not sufficient, as we deem it, to prove an abandonment; but non-user, if continued for such a length of time, coupled with other acts of a character which would within themselves tend to show an intention on the part of the owner not to resume or repossess himself of the thing whose use is relinquished, may constitute an abandonment.

Applying these rules to the conceded facts in this case, we are bound to find and do find that the claim of the defendant is not well taken, and therefore the plaintiff is entitled to the relief prayed for in his petition.

Judgment for plaintiff as prayed for in his petition. Injunction made perpetual. This case is remanded to the common pleas court for execution as to costs.

POWELL, J., and SHIELDS, J., concur.

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**RIGHTS OF INJURED RAILWAY EMPLOYEES WHO ARE
MEMBERS OF A RELIEF DEPARTMENT.**

Court of Appeals for Franklin County.

Before Judges Chittenden, Kinkade and Richards, of the Sixth District.

**RUSSELL L. BLANEY v. THE BALTIMORE & OHIO
RAILROAD COMPANY.**

Decided, February 14, 1917.

Railways—Injured Employee May Sue—Notwithstanding His Membership in a Relief Department—Extent to Which Public Policy as Announced by the Supreme Court—Has Been Changed by Subsequent Legislation.

A contract of a so-called relief department of a railroad company can not preclude an employee of such railroad company, who is a member of the relief department, from maintaining an action to recover damages for injuries sustained through the alleged negligence of the railroad company, but such a suit to recover damages, unless terminated as provided by the regulations of the relief department, will preclude a recovery under the relief department contract.

F. S. Monnett, for plaintiff in error.
Frazier & Frazier, contra.

CHITTENDEN, J.

Error to the court of common pleas.

This action was brought to recover a sum claimed to be due as benefits by virtue of membership in the relief department of the defendant company. A demurrer was sustained to the petition, and thereafter an amended petition was filed, to which a demurrer was also sustained, and plaintiff was given leave to file a second amended petition on or before the 16th day of January, 1915. On April 5, 1915, no further leave of court having been asked or obtained, a second amended petition was filed. The defendant moved to strike the second amended petition from

the files for the reason that it was filed without leave, and because it reiterates, as a first cause of action, the same averments, without addition thereto, which had theretofore been adjudged by the court as failing to state a cause of action; also, on the ground that the second cause of action attempted to be set up was not a proper or legitimate pleading in the alternative. The motion to strike the second amended petition from the files was sustained and the court proceeded to enter final judgment in the action, dismissing the petition of the plaintiff at his costs.

It is claimed here that the court erred in granting this motion to strike from the files. We find no abuse of discretion on the part of the trial court in granting this motion.

The case therefore presents itself in this court upon the question as to whether the court erred in sustaining the demurrer to the amended petition. This pleading, in substance, sets forth that on the 10th day of July, 1911, the plaintiff was employed as a yardmaster of the defendant company at or near Parkersburg, West Virginia. That at that time the defendant maintained and operated a relief department and that the plaintiff was a member thereof. That he remained in the employ of the company from the 10th day of July, 1911, until the 6th day of November, 1911, at which time he was injured through the alleged negligence of the defendant, which injuries resulted in the amputation of his right leg below the knee. That during the time of his employment the defendant had deducted from his wages, in accordance with the terms of the contract of employment and pursuant to the agreement of the membership in the relief department \$5 per month as a premium. He alleges that at the time of the injury both the plaintiff and defendant were engaged in interstate commerce. By reason of the contract between the plaintiff and the relief department the defendant was to pay benefits to the plaintiff for accidental injury, in the sum of \$2.50 per day, not including Sundays and legal holidays, for the first fifty-two weeks, and after that time at the rate of \$1.25 per day. It is further provided that the company shall furnish an artificial limb, the reasonable value of which the plaintiff alleges to be \$100. Plaintiff says that the defendant has refused

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to pay him any benefits or to furnish him with an artificial leg as agreed.

The petition further sets forth that he has performed all of the conditions of the contract upon his part to be performed, except that he did not strictly comply with the notice of injury to the defendant company, but he alleges that the defendant waived the condition of the rules and regulations of the relief department requiring formal proof of loss and injury, by tendering him one year's benefit for his injury. He says, however, that the tender of benefits was conditioned upon his releasing the company from any liability under the contract that said company might be subjected to for the wrongful and negligent acts of the company in causing said injury, and also required the plaintiff to agree not to sue the company for the tort committed by the company, and to dismiss his cause of action then pending in the courts of West Virginia against the defendant company, for the reason that rule No. 53 of the regulations of the relief department precluded the plaintiff from recovering any benefits under his certificate of membership while suit was pending.

The amended petition contains the further allegation not contained in the original petition, that the suit brought by the plaintiff against the defendant in the courts of West Virginia to recover damages because of his injury, is now terminated against the plaintiff. He quotes from the regulations of the relief department provisions of Sections 52 and 53 as follows:

"In the event of disability or death from accidental injuries, the benefits herein promised shall not be payable or paid until there be first filed with the superintendent of the relief department releases satisfactory to him releasing the Baltimore & Ohio Railroad Company, and all other companies owning or operating its branches or divisions, or company over whose railroad, right-of-way or property the said the Baltimore & Ohio Railroad Company, or any company owning or operating its branches or divisions, shall have the right to run, operate its engines or cars, or to send its employees in the performance of their duty, or any company whose employees are admitted to the privileges of this department, from all claims for damages by reason of such injury or death, signed by all persons who might bring suit for such damages, or those legally competent to release for them, and

by the beneficiaries named in the respective applications." (Section 52.)

"Should suit be brought by a member, his beneficiary or legal representative, or for the use of his beneficiary alone or with others, against the Baltimore & Ohio Railroad Company, or any company owning or operating its branches or divisions, or any company over whose railroad, right-of-way or property the Baltimore & Ohio Railroad Company or any company owning or operating its branches or divisions, shall have the right to run or operate its engines or cars or to send its employees in the performance of their duty, or any company whose employees are admitted to the privileges of this department, for damages on account of injury or death of such member, no benefits on account of such injury or death shall be paid, but all claims to such benefits under these regulations shall be forfeited, unless such suit be discontinued and all costs incurred by the defendant therein paid by the plaintiff before any hearing or trial on demurrer or otherwise. Should such a suit for damages on account of the death of a member be brought by any person claiming an interest other than those named above, the existence of such a suit shall prevent the payment of benefits on account of such death, and any payment by any of the companies above named of damages recovered in such suit, or determined by compromise, or of any costs incurred therein, shall operate as a release in full of all claims against this department." (Section 53.)

The plaintiff claims that the provisions of the above quoted rules are wholly void and against public policy so far as they purport to bar the plaintiff from his rights to the benefits claimed by him and as set forth in his amended petition.

A similar contract was construed by the Supreme Court of this state in *P., C., C. & St. L. Ry. Co. v. Cox*, 55 O. S., 497. It was there held that such a contract was not prohibited by a statute of the state of Ohio enacted for the protection and relief of railroad employees. This act prohibited any railroad company from demanding, accepting or requiring any employee to enter into a contract with the company whereby such person stipulated or agreed to surrender or waive any right to damages against the railroad company arising from personal injuries, or whereby he agreed to surrender or waive, in case he asserted the same, any other right whatsoever. It was also held that the contract was

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not contrary to public policy. The view the court took of the contract was that it provided for optional remedies to the injured employee. That the effect of the contract was not to surrender or waive any right to damages against the railroad company, but only an agreement that he might either pursue his remedy against the company for damages or accept his stipulated benefits from the relief fund. The court expressed the opinion that such contracts were not only not against public policy, but were in fact in accord with the wholesome public policy that favors the settlement of controversies and discourages litigation.

The Supreme Court again had the subject before it in the case of *State of Ohio, ex rel, v. P., C., C. & St. L. Ry. Co.*, 68 O. S., 9. After a review of the authorities and a careful examination of the questions presented, the court cited the case of *Railway Co. v. Cox, supra*, and said: "We are still satisfied with that decision and believe it to be entirely sound." Thus it will be seen that the Supreme Court of the state, after a careful review of the subject in two cases, definitely decided that relief department contracts of the character of the one under consideration are not opposed to the public policy of this state.

Therefore, it remains to determine whether the public policy thus announced has been changed by legislative enactment, and if so, to what extent. The case at bar being one that arises out of interstate commerce, our attention is called to the federal enactments upon the subject.

The plaintiff relies largely upon the provisions of Section 10 of the act of June 1, 1898, 4 Fed. Stat., 787. This section makes it a misdemeanor to require any employee to enter into a contract whereby such employee shall agree to contribute to a fund for beneficial purposes, and to release such employer from legal liability for any personal injury, by reason of any benefit received from such fund, beyond the proportion of the benefit arising from the employer's contribution to such fund. This section of the United States statutes makes unlawful a contract undertaking to exempt the employer from legal liability for any personal injury, by reason of any benefits received under the terms of such contract.

Is the contract complained of in this case within the inhibition of the statute above cited? Section 52 does indeed provide that the benefits provided for shall not be paid until there is first filed with the superintendent of the relief department a release of the Baltimore & Ohio Railroad Company from all claims for damages by reason of such injury or death. But Section 53, which constitutes a part of the contract between the relief department and the member, contemplates that suit may be brought notwithstanding the provisions of Section 52, and it is provided that if suit be brought by a member no benefits on account of such injury shall be paid, but all claims to such benefits shall be forfeited unless the suit be discontinued and all costs incurred by the defendant therein be paid by the plaintiff before any hearing or trial on demurrer or otherwise. It will be seen that this contract does not by its terms undertake to release the employer from legal liability for personal injuries received by the employee. We are not confronted in this case by a release signed by the plaintiff upon his receiving benefits from the fund, for no such benefit has been paid and no such release has been executed. It is entirely clear from the decided cases that if such benefits had been received and a release executed it would not bar an action against the defendant to recover damages.

Another act of Congress bears directly upon the construction to be given to this relief department contract. It is Section 5 of the act of April 22, 1908, Fed. Stat. Supp., 1909, page 585, and known as the second employer's liability act. It reads as follows:

"That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void; provided, that in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or to the person entitled thereto on account of the injury or death for which said action was brought."

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It will be observed that the section just quoted does not undertake to invalidate all contracts providing for the payment of benefits from a relief fund, but only enacts that they shall be void to the extent that the common carrier undertakes to exempt itself from any liability created by that act, and then makes provision that when suit is brought against such common carrier under any of the provisions of the act, the common carrier may set off any sum that it may have contributed to the relief benefit fund, and that may have been paid to the injured employee or to any person entitled thereto on account of such injury.

The effect of accepting benefits from the relief department of a common carrier, and of a release executed in pursuance thereof, was considered by the Supreme Court of the United States in the case of *C., B. & Q. R. R. Co. v. McQuire*, 219 U. S., 549. The case arose in the state of Iowa where the Supreme Court of Iowa previously had held in accordance with the decision of the Supreme Court of the state of Ohio in *Railway Co. v. Cox*, *supra*, namely, that a relief department contract was not invalid because payment of benefits was conditioned on a release of the company from liability, and that the effect of the contract was only to give the injured person an election of remedies. That he might either bring suit for damages, or accept benefits under the contract, and that the election to pursue one remedy operated as a waiver of the other. Thereafter the Legislature of the state of Iowa passed an act to the same effect as Section 5 of the federal statute above quoted. The Supreme Court of the state of Iowa held that this was a legislative announcement of a public policy different from that which had been announced by the Supreme Court, and that it was within the power of the Legislature to enact such a statute. The Supreme Court of the United States in reviewing the judgment of the Supreme Court of Iowa approvingly quoted this language of the Supreme Court of Iowa in construing that act:

“The Legislature does not in this act forbid or place any obstacle in the way of such insurance, nor does it forbid or prevent any settlement of the matter of damages with an injured employee fairly made after the injury is received. On the con-

trary, the right to make such settlement is expressly provided for in the amendment to Code, Section 2071. The one thing which that amendment was intended to prevent was the use of this insurance or relief for which the employee has himself paid in whole or in part, as a bar to the right which the statute has given him to recover damages from the corporation."

The Supreme Court of the United States affirmed the judgment of the Supreme Court of Iowa, holding that a release from liability signed by the injured party upon receipt of benefits did not operate as a bar to an action brought to recover damages because of such injuries.

To the same effect was the decision of the Circuit Court of Greene County in this state in the case of *P., C., C. & St. L. Ry. Co. v. Sheets*, 15 C.C.(N.S.), 305, affirmed by the Supreme Court without opinion. In the latter case Judge Allread carefully reviewed the authorities, including the case of *Railway Co. v. Cox*, *supra*, and held that the latter case was not, in view of Section 5 of the federal act above quoted, decisive of the construction of the contract then before the court.

It must be said that the decision of the Supreme Court in *Railway Co. v. Cox*, upholding relief benefit contracts as not against public policy because such contracts only provide for an election of remedies, is no longer an authority in so far as that public policy has been affected by the federal enactments above cited. The effect of those statutes is to render void any release of a common carrier from liability for damages, upon receipt of benefits from a relief fund. It is not apparent that the federal statutes have gone further. No statute provides that the bringing of a suit to recover damages resulting from injuries sustained because of the negligence of the common carrier shall not act as a bar to the recovery of benefits from the relief fund, and it would seem that the courts would not be justified in announcing any new or different public policy in that respect. The decisions of the Supreme Court in *Railway Co. v. Cox* and *State, ex rel, v. Railway Co.*, *supra*, have only been modified to the extent indicated, and we therefore find no reason for holding invalid that portion of the contract under consideration which provides that

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if suit is brought no benefits shall be paid, unless such suit be discontinued and all costs incurred by the defendant therein be paid by the plaintiff, before any hearing or trial on demurrer or otherwise. This portion of the contract in no way attempts to abridge the right of the plaintiff to secure redress in the courts of the state. If he had recovered a judgment against the defendant in his action in the courts of West Virginia, it would hardly be claimed that he would be entitled also to recover in this action. In *Railway Co. v. Cox*, Judge Spear mentions this phase of the case in the following language:

“Perhaps the point would be clearer if the party had, without accepting benefits, recovered against the company and then sought to recover also the benefits against the fund. No one could possibly suppose, in such a case, that his right to recover was absolute, or could in any aspect have a legal existence, or become the subject of a waiver, if the party’s own contract is to be observed.”

The fact that the pleading states that the suit was terminated against him, in no sense affects the legal aspect of the case. He was permitted to and did endeavor to maintain his legal rights in court.

There is much force in what was said by Judge Rogers of the common pleas court in passing upon this demurrer. He said:

“Although the contract is void and unenforceable by the defendant, the plaintiff having the option to treat the contract as valid, because it is not void as to him, must, in order to entitle him to a recovery, perform those terms which are imposed upon him by the contract. Plaintiff can not repudiate the contract in part and stand upon the contract at the same time. If it was against public policy for the defendant to require the plaintiff to enter into a contract for beneficial insurance and to make a condition of the contract that in case suit was brought for an injury the benefits for such injury were to be forfeited, plaintiff must treat both the contract for benefits and the condition of its payment as valid, or repudiate the whole contract, and will not be permitted to repudiate a part and rely upon another part.”

Ropp v. County Commissioners.

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The contract provides that in order to secure benefits after a suit is brought, the suit must be discontinued and all costs incurred by the defendant therein paid by the plaintiff, before any hearing or trial on demurrer or otherwise. The allegations of the amended petition do not show that the plaintiff has complied with this condition of the contract.

We find that the amended petition does not state facts sufficient to constitute a cause of action against the defendant, and that the judgment of the common pleas court was correct, and its judgment will be affirmed.

KINKADE, J., and RICHARDS, J., concur.

**RIGHT OF A LABORER TO A LIEN UNDER A CONTRACT
WHICH HAS BEEN SUB-LET.**

Court of Appeals for Hardin County.

ROPP V. BOARD OF COUNTY COMMISSIONERS OF HARDIN
COUNTY, OHIO, ET AL.

Decided, November 17, 1917.

Mechanic Lien of Sub-Contractor on Fund When His Principal Contractor Discontinues Work.

A laborer who contracts to do and does perform certain of the labor, required in the construction of an improvement under a sub-contract with the principal contractor, is entitled to a lien upon the building fund in the hands of the owner, notwithstanding the principal contractor has sub-let to a third party, without notice to said laborer who continues his labor, that portion of his contract including such labor, or has suffered the owner to contract directly with said third party for such portion of the improvement, even though a portion of such labor is performed after such third party has begun the discharge of his contract, he having received the benefit of such labor.

Price & Price, for plaintiff.

Donald F. Melhorn and Stickle & Cessno, contra.

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Hardin County.

HUGHES, J.

The board of county commissioners entered into a contract with Anstine & Connor for the improvement of the Reigel Free Turnpike in Jackson township, Hardin county, Ohio. In August, 1915, Anstine & Connor entered into a verbal contract with Albert Ropp, the plaintiff, to do certain hauling for this improvement at an agreed price of \$4 per day. Plaintiff, in the execution of this contract, hauled on dates running from the 10th of August, 1915, to the 1st of September, 1916, which by the terms of his contract amounted in value to \$158.95. Thirty-two dollars and thirty-five cents of this amount is claimed to have accrued on work done after an alleged sub-contract had been entered into between Anstine & Connor and Dalton Hord for the sub-contracting of this same improvement.

The plaintiff filed proper notices and perfected a lien within the statutory time from the date of the last hauling, but it is contended by the defendant Hord that this perfected a lien only for the \$32.35 upon the theory that labor in the value of this amount was done while Hord was executing his contract, and that the balance was done under an independent contract between Anstine & Connor and the plaintiff Ropp.

This theory of Hord is presented as an issue by the averments of his answer, which are denied by the plaintiff.

Whether Hord be considered as a sub-contractor, undertaking to complete the work covered by the original contract between the commissioners and Anstine & Connor, or whether he be considered as an independent contractor with the commissioners, it may be said that in any event what he undertook to do was to complete the work that was originally contracted to be done by Anstine & Connor.

It is clear that the plaintiff began the execution of his contract for hauling, and from all that appears in the evidence, he had no reason to believe that when he began his work in the spring of 1916 he was but completing the undertaking that he had originally contracted to do, no evidence being offered tending to show that he had any reason to believe that the work which he had already done in the execution of this contract

should be considered as a past transaction, nor that the work he was finishing was to be paid for in any other manner than for the work which he had already done.

As was said by Judge Spear in the case of *Vernon v. Harper*, 79 O. S., 181:

“The policy of the state with respect to the claims of laborers and material-men to be compensated for their work and material out of the structure to which their work and material have contributed is indicated by the statute as to liens and has been clearly defined in a number of decisions in this and other courts. The statute should be liberally construed in order to carry out the purpose of the General Assembly in its enactment, the legislation being highly remedial in character.”

Following the thought expressed by this same jurist, at page 188, it may well be said that Hord finished the work that was to have been done by Anstine & Connor with the aid of this plaintiff who finished his labor, acting in good faith in compliance with his contract originally entered into with the principal contractor, and his contribution to the work thus accepted by Hord enabled him to complete the work contemplated by the original agreement.

To deny plaintiff the advantage of his outlay would be to permit the mere letter override and defeat the plain spirit and purpose of the statute.

Entertaining these views, we hold that the plaintiff is entitled to a lien on the fund for the full amount of his claim. A decree may be drawn accordingly.

KINDER, J., and CROW, J., concur.

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Lucas County.

**SHIPPER LIABLE FOR BALANCE WHERE LESS THAN
AUTHORIZED RATE WAS CHARGED.**

Court of Appeals for Lucas County.

THE NEW YORK CENTRAL RAILROAD COMPANY V.
FREDERICK O. PEAK.

Decided, June 25, 1917.

*Railway Tariffs—Carrier May Recover Balance—Where Less than Legal
Rate Was Charged—Review on Weight of the Evidence of Final
Judgments by Justices of the Peace.*

1. The Interstate Commerce act having been adopted to prevent unjust discrimination in freight rates, the rate of the carrier duly filed pursuant to that act is the only lawful charge and is binding alike on the shipper and carrier.
2. The shipper is charged with notice of the regular fixed tariff freight rate duly filed, and a misquotation of the rate by the carrier's agent will not relieve the shipper from paying the tariff rate although he has made the shipment and paid the quoted rate therefor.
3. By virtue of the provisions of Section 10361, General Code, final judgments rendered before a justice of the peace, whether tried with or without a jury, may be reviewed on the weight of the evidence by proceedings in error.

*Doyle, Lewis, Lewis & Emery and Paul W. Alexander, for
plaintiff in error.*

E. H. Ray, contra.

RICHARDS, J.

Error to the court of common pleas.

This action was commenced by the New York Central Railroad Company as successor of the Lake Shore & Michigan Southern Railway Company, before a justice of the peace, to recover an amount claimed to be due it from the defendant by reason of an undercharge of freight made by it in a shipment of fifteen horses from Boswell, Indiana, to Sylvania, Ohio. At the conclusion of the trial before the justice of the peace, a motion was

made by the plaintiff for a directed verdict in its favor, which was overruled and an exception taken. The jury returned a verdict for the defendant and judgment was rendered thereon. A bill of exceptions was taken setting forth all of the evidence, and error was prosecuted to the court of common pleas, which court affirmed the judgment rendered in favor of the defendant.

On the trial of the case the plaintiff introduced in evidence the printed tariff of freight charges from Boswell, Indiana, to Sylvania, Ohio, showing the rate to be thirty-two cents per hundredweight when the shipment was made *via* Sandusky over the L. E. & W. Railway, and thence to Sylvania over the L. S. & M. S. Railway. It also appears that shipment could be made, and in this case in fact was made, *via* Fostoria over the L. E. & W. Railway, and thence to Toledo over the T. & O. C. Railway, and to Sylvania over the L. S. & M. S. Railway. On this latter route the joint rate was thirty-two cents per hundredweight to Toledo, and then there was an additional rate from Toledo to Sylvania of seven and one-half cents per hundredweight. The defendant desired to ship *via* Fostoria and Toledo and was informed by the companies' agent that the rate was thirty-two cents the same as if the shipment had been made *via* Sandusky. But the agent was plainly in error in giving this rate, as it omitted the regular tariff rate, as shown by the schedule on file with the Interstate Commerce Commission, of seven and one-half cents per hundredweight from Toledo to Sylvania. This action is to recover this latter charge of seven and one-half cents per hundredweight.

Some contention was made that the railroad official, identifying the schedule on file with the Interstate Commerce Commission, was not able to say that the rate sheets introduced in evidence embraced all of the rates in force at that time for shipments over the lines of railroad mentioned, but it is entirely clear that they did embrace all the tariff rates on those roads between Boswell, Indiana, and Sylvania, Ohio.

There can be no doubt that the official rate duly fixed and filed with the Interstate Commerce Commission is binding alike on carrier and shipper. The direct question was decided by the

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Supreme Court of the United States in *Louisville & Nashville Railroad Co. v. Maxwell*, 237 U. S., 94. In that case Mr. Maxwell desired two railroad tickets by certain routes which he named, and by oversight the railroad agent quoted him a lower rate than that fixed in the published rates on file with the Interstate Commerce Commission. Mr. Maxwell, as was said in the opinion, was in no way at fault in the matter. He did no more than tell the agent the points to which he wished to go, and the agent fixed the routing in the tickets and named the fare, which Maxwell paid without question. In the case at bar Mr. Peak was without fault in the matter. The error was solely that of the agent. But, under the decision in the case just cited, this error does not relieve the defendant from the duty to pay the regular fixed tariff. I quote from the opinion of Mr. Justice Hughes on page 97 the following:

“Under the interstate commerce act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.”

It is perfectly manifest that the object of the interstate commerce act was to have but one rate and from which there could be no departure. *Erie R. R. Co. v. Steinberg*, 94 O. S., 189.

This court had a similar question in a case arising in Erie county based on an intrastate shipment, under the Ohio statute, General Code, Section 510, and reached a like conclusion. I refer to the unreported case of *Lake Erie & Western R. R. Co. v. Kelley Island Lime & Transport Co.*, decided June 12, 1914.

It is contended, however, that there was no authority for the common pleas court or this court to review the judgment of the justice of the peace on the weight of the evidence, and that the

motion for a new trial filed before the justice of the peace was not in accordance with the statute. That motion had as one ground that the judgment was against the weight of the evidence. The statutes of Ohio at one time did not authorize a review of a judgment of a justice of the peace on the weight of the evidence, but such is not the law at the present time. The language of General Code, Section 10361, authorizes such review, and the authority there given is not restricted by the language of General Code, Section 10352. See *Koch v. State*, 73 O. S., 131, 138. It is true that the case just cited was a criminal action, but the Supreme Court there held that the rule contained in Section 10361 is applicable alike to criminal and civil actions.

This court carefully reviewed the sections authorizing the review on error of judgments entered before justices of the peace, and reached a similar conclusion in the unreported case of *Brand v. Murray et al*, a Lucas county case, decided on June 7, 1916.

Counsel are not in accord as to whether the request that the justice of the peace should direct the jury to return a verdict in favor of the plaintiff was made before or after the argument. We do not regard the time of the making of that application or request to direct a verdict as important. It was clearly made before the jury had retired and should have been granted.

For the error in refusing to direct a verdict for the plaintiff the judgments rendered will be reversed and final judgment entered here for the plaintiff in error.

CHITTENDEN, J., and KINKADE, J., concur.

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**RIGHT OF HUSBAND TO RECOVER FOR SERVICES
RENDERED BY HIS WIFE.**

Court of Appeals for Jefferson County.

FRANCIS B. CLUTZ v. CHARLES H. HESS, EXECUTOR OF ESTATE OF
JOHN A. CUNNINGHAM.

Decided, December 20, 1917.

*Husband and Wife—Interest of the Former in a Claim by the Latter
for Services Rendered—Competency of Evidence by the Wife—
Where the Claim is Against the Estate of a Decedent.*

1. Sections 7995 to 7999 inclusive of the General Code, do not deprive the husband of his common law right to maintain an action for the services of his wife, where such services were performed in furtherance of her husband's business and in connection with her domestic duties, although a third party had agreed to compensate her therefor, when by her conduct she waives her right to the compensation for such services as her separate property.
2. In such an action, Section 11495 of the General Code, does not prevent the husband, where the adverse party defends as an executor, from calling his wife as a witness and introducing her testimony as to facts which occurred prior to the death of the testator.

John D. Gardner, for the plaintiff in error.
Mansfield & Merryman, contra.

POLLOCK, J.

Francis B. Clutz brought an action in the court of common pleas of this county against Charles H. Hess, as executor of the estate of John A. Cunningham, to recover on an account which he claims was due him from the estate. The case was tried in the court below, resulting in a verdict and judgment in favor of the plaintiff, and this action is prosecuted to reverse that judgment.

Clutz, the plaintiff below, is a married man, and the fourth item of the account reads;

“For wages due my wife, Crete Clutz, for services performed for John A. Cunningham at his special instance and request.”

All the errors complained of relate to this item of the account, and can be considered under two heads. First, could the plaintiff below maintain the action for the amount of the wages due for services performed by his wife? And, second, if he could, is she a competent witness in behalf of the plaintiff below?

In the fall of 1911 John A. Cunningham and Francis B. Clutz entered into a partnership to conduct a dairy on the farm of Cunningham, who lived in the village of Amsterdam, this county, the farm being some distance from that village. Cunningham was engaged in the banking business in that village. Just what each of the partners were required to do in furtherance of the partnership business, and how the business was conducted does not very distinctly appear from the record. Mrs. Clutz is the only witness who testifies in regard to the partnership agreement, and the employment of herself, for which her husband is now claiming compensation. This partnership continued until the death of John Cunningham.

Mrs. Clutz testifies that in the fall of 1912 Cunningham was at the dairy, and she and he had a conversation, which she claims to have been as follows:

“We had about forty-five cows we were milking at that time. It was more work than I could do; Mr. Cunningham spoke that way it was more work than I could stand; that he would hire the girl if we would board her, which we agreed to do; if we boarded her, he would pay the wages.”

She testified that following this conversation Audrey Mason was employed at \$3 per week; that she continued in this employment for a number of months, and when she left a sister of Mrs. Clutz was employed at the same amount per week. She testifies as to this employment as follows:

“They needed a hand and Mr. Cunningham was to pay the wages if we would board her. He said: ‘Is it satisfactory to you to do the cooking?’ I said: ‘Anything to help along with the work’; I was willing to do my share.”

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The testimony further shows that these two girls during their employment worked in this dairy, milking cows, attending to the milk and such other work as was required about the dairy, and that they did some of the work of the house-keeping at the Clutz home. Mrs. Clutz testified that she, during the time that these girls were employed, worked in the dairy doing the same kind of work as they did.

We refer to this testimony, and the work which these girls did because of its reflection upon the employment of Mrs. Clutz. After the second girl left, Mrs. Clutz claims that then she was employed to do the work that these girls had severally been doing at the dairy. She testifies as follows:

"When Miss Clutz left, my sister-in-law, he wanted to get another girl. I said, 'Mr. Cunningham,'—I called him John, if he was satisfied 'I will work for \$3 a week and do her share of the work.' He said he was willing for me to have the money if I could stand the work. It was satisfactory to Mr. Cunningham and his mother to have me do that. Of course, Mrs. Cunningham is dead now."

This is the substance of the testimony in the record in regard to her employment. She testifies that after this arrangement stated above she continued to do the work that she had been doing and also that which these two girls had done prior to her employment, until the dissolution of the partnership.

The question now arises, can the husband recover the wages due from this estate for the services performed under this agreement by his wife? It is urged that she was working there with her husband, and doing such work as a woman ordinarily would do for her husband, under similar circumstances in a dairy or on a farm, and we may concede that that is correct. But this was not the dairy of Clutz, but the work was performed in the dairy of Cunningham and Clutz. These girls and Mrs. Clutz were employed because the dairy needed additional help aside from that of the husband, and the arrangement between the partners was that Cunningham was to pay the wages and Clutz to board the girls.

Under the common law the husband had the sole right to recover for the services of his wife, but that rule has been changed by the provisions of Sections 7995 to 7999 inclusive of the General Code; and under the provisions of these sections the Supreme Court of this state in the case of *Bechtol v. Ewing, Admr.*, 89 Ohio St., 53, recognized the right of the wife to recover for her services performed under a contract with a third person. It must be conceded that under the principle announced by the Supreme Court in this case, Mrs. Clutz could have recovered in an action in her own name for these services. The question remains whether she has the sole and only right to recover.

Under the provision of Section 7995 of the General Code, the husband and wife contract toward each other obligations of mutual respect, fidelity and support.

The following section provides that the husband is the head of the family. He may choose any reasonable place or mode of living, and the wife must conform thereto.

Then by Section 7997 the husband must support himself, his wife and his minor children out of his property or by his labor. If he is unable to do so the wife must assist him so far as she is able.

As noted in the opinion in the case of *B. & O. R. R. Co. v. Glenn*, 66 Ohio St., 395, there is little change from the common law rule of the relation of husband and wife so far in the statute.

Then follows Section 7998, which provides that neither husband nor wife have any interest in the property of the other, except as mentioned in the next preceding section, etc.; and the following section provides:

“A husband and wife may enter into any engagement or transaction * * * with any other person, which either might do if unmarried.”

The Supreme Court in the case of *B. & O. R. R. Co. v. Glenn*, *supra*, held that the sections just referred to did not abridge or affect the right of the husband to recover against one who wrongfully or negligently injures his wife, for loss of her services and

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for her necessary medical and other expenses in healing her injuries.

Then the court said in the case of *Bechtol v. Ewing, Admr., supra*, that the wife could recover compensation for her services rendered outside of the home of her husband, when such services were not in the discharge of her household or domestic duties, and not in interference therewith.

Mrs. Clutz testified that the services she performed in the dairy did interfere with her domestic duties in the home; she says she neglected these duties in order to do the work in the dairy—at least to a certain extent. Prior to her contract with Cunningham Mrs. Clutz was performing, with some assistance from the girls employed, her domestic duties at home, and working the remainder of her time in the dairy with her husband. The only change that was made in the services which she rendered at the dairy after the contract with Cunningham was that in addition to the work which she had been doing previous to that time, she did the work which these girls had been doing.

In the opinion in the case of *Bechtol v. Ewing, Admr., supra*, Newman, Justice, refers to the New York statute in regard to the rights and liabilities of married women as being similar to the Ohio statute.

The Court of Appeals of New York in the case of *Birbeck v. Ackroyd*, 74 N. Y., 356 (30 Am. Rep., 304), in construing their statute, say:

“The provision of the act of 1860, concerning the rights and liabilities of married women, which authorizes any married woman to perform any labor or services on her sole and separate account, does not wholly abrogate the rule of common law entitling the husband to the services and earnings of the wife; she may still allow him to claim and appropriate the fruits of her labor, and in the absence of an election on her part to labor on her own account, or of circumstances showing her intention to avail herself of the privilege conferred by the statute, the husband’s common law right is unaffected. Where, therefore, the husband and wife are living together and mutually engaged in providing for the support of themselves and their family, and there is nothing to indicate an intention on the part of the

wife to separate her earnings, the husband may maintain an action in his own name to recover them."

And in the opinion on page 359:

"The duty still rests upon the husband to maintain and support the wife and their children and it is not necessary, in order to give the wife protection intended by the statute to hold that, irrespective of her intention, her earnings, in all cases, belong to her and not to the husband, and the language of the act does not admit of this interpretation."

Again this court, in the case of *Porter v. Dunn*, 30 N. E., 120, announces the same principle in construing this statute.

The mere fact that the wife performs some service under a contract with a third person, by which he was to pay therefor, does not necessarily imply that the compensation was her own separate property, but she can devote her time and services while so employed to her husband, and allow him to receive the benefit of her labor.

If the labor is performed in the furtherance of the business in which the husband is engaged, and they are mutually engaged in laboring for their common benefit, the statute does not deprive the husband of his common law right to recover for the services of his wife, when she does not elect to avail herself of her right under the statute, but assists her husband in collecting the fruits of her services. If she acquiesces and assists her husband in his effort to recover the value of her services rendered in advancing the enterprise in which he is engaged, the debtor can not defend on the ground that the husband can not maintain the action.

Mrs. Clutz, both before and after this contract with Cunningham, was doing work in this dairy in connection with her household duties. She was working along with her husband and advancing the business in which he was engaged. There is no indication that she ever asserted or intended to assert any right to the benefit of these services as her separate property; the exact opposite appears from the record. She is here testifying

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in behalf of her husband, both to the contract and to the services rendered.

We think that notwithstanding that the work for which recovery is sought was performed under a contract made by Mrs. Clutz with Cunningham, the husband is not deprived by the statute of his common law right to recover the compensation due for the services of his wife.

The remaining question is, was the wife a competent witness on behalf of the plaintiff below? Section 11495 of the General Code provides that a party shall not testify where the adverse party is an executor, etc., except as to facts which occurred after the appointment of the executor.

Mrs. Clutz was not a party to this action, and does not come under the direct provisions of this section. If she is prohibited from testifying on behalf of her husband it is under the following provision contained in the section:

“When a case is plainly within the reason and spirit of the next three preceding sections, though not within the strict letter, their principle shall be applied.”

The only question is, does she come within the reason and spirit of the section? If the husband could maintain this suit under his common law right for the services of his wife, she was not a necessary party, and he would not claim through any assignment or transfer from her to him, but through his own legal right to maintain the action under the circumstances already stated.

As was announced in the opinion in the case of *Ryan v. O'Connor*, 41 Ohio St., 372:

“He was, therefore, not a necessary party to the action, and the reason and spirit of the statute which excludes the testimony of a party when the adverse party claims or defends as heir of a deceased person, should not apply so as to exclude his testimony.”

A somewhat similar question was passed upon by our Supreme Court in the case of *Shaub v. Smith et al*, 50 Ohio St., 648. And

the Court of Appeals of New York, in construing their statute in a like case, held that the wife was a competent witness. *Porter v. Dunn, supra.*

Under these authorities we think the objection to the wife of Clutz testifying was not tenable. The judgment of the court below is affirmed.

METCALFE, J., and FARR, J., concur.

**DUTY OF MOTORMAN TOWARD ONE ON THE TRACK
BEFORE HIM.**

Court of Appeals for Lucas County.

DETROIT, MONROE & TOLEDO SHORT LINE RAILWAY v.
DAVID LANDESMAN ET AL.

Decided, February 5, 1917.

Negligence—Ordinary Care Required of a Motorman—Toward One Rightfully on the Track in Front of His Advancing Car—Doctrine of Last Chance.

A motorman is bound to use ordinary care to prevent injury to one who is rightfully on the track of the railway company, and in a position of peril, when he discovers or in the exercise of ordinary care would discover such person so exposed to danger.

On application for rehearing.

Tracy, Chapman & Welles, for plaintiff in error.

Sala & Carabin, for defendant in error, Landesman.

H. E. King, for defendant in error, the Toledo Railways & Light Company.

CHITTENDEN, J.

Error to the court of common pleas.

The defendant in error fell upon the railway track on one of the streets of the city of Toledo in the night season and was injured by a car of the plaintiff in error. A verdict and judgment

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were rendered in favor of the defendant in error, and the judgment was affirmed by this court.

We have made a careful examination of the reasons advanced by the plaintiff in error for a rehearing of this case. Upon consideration thereof, each member of the court adheres to the views entertained at the time the case was decided, and as expressed in the written opinions then filed.

It is urged that the effect of the decision announced by the majority of the court is to permit the jury to guess and speculate in arriving at their verdict. The court is entirely familiar with the cases cited upon this feature of the case, and has many times applied the doctrine announced in those cases. A majority of the court are of opinion that the effect of their decision is not as claimed by counsel for plaintiff in error, and we do not care to add anything to what was stated in the opinion heretofore rendered.

Counsel for plaintiff in error have made a very careful review of cases decided by the Supreme Court, circuit courts and courts of appeals of this state upon the doctrine of the last clear chance. We have read the brief upon this subject with great interest and have given very careful consideration to this important subject. We will not undertake to enter into any discussion or analysis of the many cases commented upon, but will only state that we think that the correct rule is announced in the case of *Drown v. Traction Co.*, 76 O. S., 234, in which the court, on page 248, say:

“According to the better view with reference to injuries to travelers at highway crossings—as distinguished from injuries to trespassers and bare licensees upon railway tracks at places where they have no legal right to be—the servants of the railway company are bound to keep a vigilant lookout in front of advancing engines or trains, to the end of discovering persons exposed to danger on highway crossings; and the railway company will be liable for running over them if, by maintaining such a lookout and by using reasonable care and exertion to check or stop its train, it could avoid injury to them.”

We think that this principle is recognized and announced in the later case of *Traction Co. v. Brandon*, 87 O. S., 187. The

distinction to be drawn between cases where liability depends upon actual knowledge and those where liability rests upon a failure to exercise ordinary care in ascertaining the dangerous situation of the plaintiff is found stated in those cases; namely, actual knowledge may be necessary when the injured person is a trespasser upon tracks, or a mere licensee; whereas the defendant is bound to exercise ordinary care to ascertain the presence in a dangerous situation of one rightfully on the track and likely to be injured.

This court has recognized this distinction in a number of cases. We call attention to the case of *Cleveland, Painesville & Eastern Railroad Co. v. Stevenson, Adm'r of the Estate of John S. Frischkorn*, decided in Cuyahoga county on January 11, 1915 (unreported). In speaking of the duty of a motorman upon an interurban car approaching a highway crossing in the open country, we said:

"It is his duty to keep a vigilant lookout in front of his advancing car that he may discover persons exposed to danger on highway crossings, and when he does discover, or in the exercise of ordinary care would discover, that persons will not refrain from going upon the crossing, it is his duty to exercise ordinary care to check or stop his car in order to avoid injuring them."

To the same effect is the case of *Ohio Electric Railway Co. v. Sarah Leininger, Adm'r*, decided January 10, 1916 (not reported).

The rule above announced took cognizance of the fact that one upon a highway crossing was not a trespasser upon the tracks of the defendant company. So, in the streets of a city a pedestrian is not a trespasser upon the tracks of the company in attempting to cross such tracks, although not at a street intersection.

Especial attention has been called to the case of *Cincinnati Traction Co. v. Edwards*, 22 C.C.(N.S.), 539. It is claimed that this case is in conflict with the decision announced in the case now under review upon the question of last chance. Counsel say that certified copies of the pleadings and other papers are submitted with the brief, but we do not find them. In view of

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what Judge Gorman said concerning the pleadings and the evidence, we did not think it necessary to call on counsel to produce such copies, it being plainly manifest that the case was not one of last chance.

We strongly feel that the decision of the Supreme Court in the case of *Railway Co. v. McCormick*, 69 O. S., 45, while no doubt correct, in view of the state of the pleadings and the facts in that case, ought not to be extended to cases of the character of the one at bar.

Many illustrations readily occur to one to show that to strictly apply the rule contended for by counsel for plaintiff in error, namely, that the driver of an engine or car must have actual knowledge of one not a trespasser, being in a perilous position, before the so-called doctrine of last clear chance can be applied, would in many instances accomplish injustice instead of justice. If a pedestrian were crossing a street railway track in a municipality and should be stricken with paralysis, by reason of which he fell in a helpless condition upon the track, and a street car was approaching at a sufficient distance that it might easily be stopped and prevent injury by the exercise of ordinary care upon the part of the motorman, it would be anything but a just or humane law that would permit the railway company to escape liability by simply proving that the motorman did not see the man upon the track in his helpless condition, when, if the motorman had been exercising ordinary care in keeping a lookout ahead, he could and would have seen him in time to prevent the accident. Without multiplying illustrations, and without any further comment, we are unanimously of opinion that the contentions of counsel for plaintiff in error to the effect that the doctrine of last chance can only apply in cases where the motorman has actual knowledge of the perilous position of the party in time to avert the accident, and does not apply to cases where the motorman in the exercise of ordinary care would have had such knowledge and can not be sustained.

The application for rehearing will be denied.

RICHARDS, J., and KINKADE, J., concur.

PROOF REQUIRED FROM A RAILWAY OF FOREIGN INCORPORATION SEEKING TO EXERCISE EMINENT DOMAIN.

Court of Appeals for Pike County.

KEZIAH D. BARGER ET AL V. THE CHESAPEAKE & OHIO NORTHERN RAILWAY COMPANY.

Decided, May 31, 1917.

Eminent Domain—Burden of Proving Authority to Exercise Right of—Where Plaintiff Company is Incorporated Under the Laws of Another State—Necessity for Such Proof Not Abrogated by Section 8759.

A railway company, incorporated under the laws of another state and seeking to exercise the right of eminent domain in this state, has at the preliminary hearing the burden of proving by a preponderance of the evidence—

(1) Its incorporation in accordance with the laws of the state of its domicil.

(2) That those whose names appear as stockholders are stockholders in good faith.

(3) That it has organized a board of directors and said board has met and organized.

(4) That it is a *de jure* corporation, vested with the power of eminent domain in the state of its creation.

(5) That it is unable to agree with the owner of the land in question as to the compensation to be paid therefor.

(6) That a necessity exists for appropriation of the land for railway purposes, and that its board of directors has so declared.

G. W. Rittenour, of Waverly, and C. E. Blanchard and Robert J. Odell, of Columbus, for plaintiffs in error.

Henry Bannon, of Portsmouth, and Levi B. Moore, of Waverly, contra.

Error to the Court of Common Pleas of Pike County, Ohio.

WALTERS, J.

The railway company filed its petition in the Probate Court of Pike County, Ohio, to condemn certain lands of the defendants

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through which it proposed to build its railroad. In its petition it alleged that it "is a corporation duly organized under the laws of the state of Kentucky," and that "it is authorized as well by the laws of the state of Kentucky, and by its charter fully granted to it by the state of Ohio, as by the laws of the state of Ohio, to appropriate lands under the statutes of the state of Ohio."

These allegations were denied by the defendants, and it was necessary for it to prove these facts by a preponderance of the evidence. The laws of a foreign state must be proven as any other fact in the case. There is no evidence in this case showing that it was authorized by the laws of the state of Kentucky, authorizing its incorporation and organization and that it has complied with these laws, and that the power of eminent domain has been conferred upon it by the laws of the state of Kentucky.

"The laws of another state, where they come in question in the courts of this state, must be pleaded and proven as matters of fact." *Williams v. Finley*, 40 O. S., 342.

No attempt was made to prove these laws, and this was error.

The burden of proof is upon the railway company to prove that it has a *de jure* organization, and that its stockholders and directors are *bona fide* stockholders and directors in their own right.

In *Powers v. Hazelton & L. Ry. Co.*, 33 O. S., 429, the court held:

"It is essential to the exercise of the right of eminent domain for the company to prove that it has fully organized by the election of directors, and that they are unable to agree with the owner of the property upon the compensation to be paid therefor."

In this case, at page 432, the court says:

"The condemnation of land for the construction of the road comes within the powers to be exercised by the corporation through its directors. It was therefore incumbent on the company to show, in addition to the fact of its incorporation, that it had brought itself into a condition to exercise its powers for the construction of the road, by a full organization in the election of directors."

In *Telephone Co. v. Cincinnati*, 73 O. S., 64, at page 77, the court said:

"In *Powers v. Ry. Co.*, 33 O. S., 429, it is held that it is essential to a judgment of condemnation in an appropriation proceeding that the company should prove its corporate existence, and among other things show that it has fully organized by the election of directors.

"Proof of the existence of the corporation and of its right to make the appropriation is also now required by Section 6420, Revised Statutes, and the determination by the court of those questions favorable to the company is made jurisdictional."

It is contended that the filing of articles of incorporation was conclusive evidence of the existence and incorporation of the corporation, but the court, at page 360 of the case last cited, following 49 O. S., 440, holds that:

"The making and filing for the purpose of profit of articles of incorporation in the office of the Secretary of State do not make an incorporated company; such articles are simply authority to do so."

In 2 N.P.(N.S.), 349, the court says:

"The organizing of a corporation is the election of officers by the stockholders. All lawyers use the word 'organizing' in this sense. * * * To obtain a charter and to certify that ten per cent. of the stock is subscribed are only the first steps towards forming a corporation. At such a state of its existence a corporation can not be said to be organized, and the term is not so used in the reports."

This decision was affirmed by both the circuit and Supreme Courts, 5 C.C.(N.S.), 411, and 73 O. S., 641.

In *American Ball Bearing Co. v. Adams*, 222 Fed. Rep., 967, Mr. Justice Clarke delivering the opinion of the court held:

"Whether or not an organization is a valid corporation is to be determined by the statutes and decisions of the state where it is organized."

In *State v. Insurance Co.*, 49 O. S., 440, it is said:

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"The making and filing of articles of incorporation in the office of the Secretary of State do not make an incorporated company; such articles are simply authority to do so. No company exists within the meaning of the statute until the requisite stock has been subscribed and paid in, and the directors chosen."

In the case at bar it was necessary for the railway company to prove by the statutes and decisions of the state where it was organized that it is organized as a valid corporation. All these preliminary steps must be strictly pursued and proven.

Cemetery Assn. v. Traction Co., 93 O. S., 161, syllabus 1, 2 and 3:

"1. The right of eminent domain belongs to the sovereign power, and statutes delegating authority to exercise it must be strictly construed. When it is sought to take the property of an individual under statutes granting such authority to corporations, subject to conditions specifically set forth, the protection of the constitutional guaranty of the right of private property requires that the powers granted by the Legislature be strictly pursued and all of the prescribed conditions be performed.

"2. In a proceeding by a railroad company to appropriate land for its use, it is incumbent on the company to prove its incorporation according to law, including the due and legal election of directors, its right to make the appropriation, its inability to agree with the owners and the necessity for the appropriation. By the provisions of Section 11046, General Code, the determination by the court of those questions favorably to the company is made jurisdictional.

"3. The statutory requirements provided by Section 8632 *et seq.*, General Code, for the creation of a corporation are mandatory and must be complied with before the corporation can be in existence."

Certain extracts from a book referred to as the "Plaintiff's Corporate Minute Book" were offered in evidence. The book was not identified by any witness who made it, or who was the official secretary, or who had official possession of it. The extracts were incompetent evidence.

105-106 O. L., p. 347: This section, as amended, does not excuse the company from showing that it is a foreign corporation or from showing the preliminary steps which shall be taken.

The fact that a demand was made to produce certain books and papers containing evidence relating to the merits of the action and defense does not estop the Bergers from objecting to their introduction. The object of the production of books and papers is that the party demanding them may have an opportunity of inspecting them.

The Bargers are not estopped by having given an option on the land because they never received any benefit thereunder and the said contract was abrogated before any benefits were received by them, and therefore no injury was done the railway company.

The railway company must prove by a preponderance of the evidence, in order to acquire jurisdiction to exercise the right of eminent domain, before the probate court on the preliminary hearing:

1st. That it was duly incorporated under the laws of the state where such incorporation was had when the hearing is had in a state other than that of its incorporation, and it must be proven as any other fact in the case.

2d. It must prove that its stockholders are real stockholders in good faith.

3d. That it has organized a board of directors, and that said board has organized.

4th. That it is a *de jure* corporation.

5th. That it has attempted to agree with the owner of the land as to the compensation and damages, and has failed to do so.

6th. That it was necessary to appropriate the land for the uses and for railroad purposes.

7th. That the road's directory has declared that it is necessary for the purposes of the road.

8th. That the power of eminent domain has been conferred upon it by the Kentucky laws.

For the errors indicated the judgment of the court below is reversed, and the cause remanded to the probate court for further proceedings according to this opinion and according to law.

ALLREAD, J. (of the second district, sitting in place of Middleton, J.), and SAYRE, J., concur.

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BENEFITS AWARDED TO A DESERTED WIFE IN ITALY.

Court of Appeals for Delaware County.

MARIA PLACIDE BELLOMO MUSSELLI v. THE INDUSTRIAL COM-
MISSION OF OHIO.

Decided, July 5, 1917.

Workmen's Compensation—Legal Wife Not Barred from Benefits Under the Ohio Act—By a Bigamous Marriage by the Deceased Husband—Humane Purpose of the Compensation Act.

The fact that one killed in the course of his employment had contracted a bigamous marriage does not bar his legal wife living in Italy from receiving benefits under the Ohio workmen's compensation act, where there is no evidence that she had been other than a faithful wife.

Paxton, Warrington & Seasongood, for plaintiff in error.
E. C. Turner and D. M. Cupp, contra.

HOUCK, J.

Error to the Court of Common Pleas of Delaware County.

The error complained of in this case is to the sustaining of a general demurrer to the petition of the plaintiff below, the plaintiff in error here. The following are the material allegations of the petition:

Plaintiff is the lawful widow of one Raphael Musselli, who on or about the first day of December, 1913, received an injury, while in the course of employment with the Delaware Blue Limestone quarry, and from such injury died; that the wages earned by the decedent at the time of the injury were three dollars per day, and that application was made by the plaintiff for compensation to the Industrial Commission of Ohio; that plaintiff's application for compensation was disallowed by the said commission for the reason that the plaintiff herein was not a dependent of the deceased at the time of the injury causing his death; that the decedent came to the United States of America about the

year 1901, leaving plaintiff and a child in Italy; that after the decedent's arrival in America correspondence was continued with the plaintiff from time to time, and that the decedent sent plaintiff money at various times; that two attempts were made by the decedent and plaintiff to have plaintiff come to the United States of America, but said plaintiff was refused the right of immigration, the last attempt being made in 1908.

The petition further alleges that the last money received by plaintiff from her husband was in January, 1909; that shortly after this time Raphael Musselli married a woman in the state of West Virginia, with whom he lived for about one year and a half, after which time he left the woman he had married in West Virginia and came to Piqua, Ohio, later locating in Delaware, Ohio; that the decedent often spoke affectionately of his family in Italy, and that he had given some money to a friend, which was placed in a letter, addressed to plaintiff, and mailed in New York city, and the reason given for this peculiar action is that the decedent did not desire to have it known where he was located; that the decedent while in this country had never made application to become a citizen of the United States, and that he always expected and looked forward to returning to the kingdom of Italy; that plaintiff is extremely poor, and that since the death of the decedent she has not remarried, and that she is dependent for her livelihood upon labor in the fields, when such employment can be obtained.

The petition further alleges that the plaintiff is the lawful wife of the decedent, and dependent upon him within the meaning of the workmen's compensation law, and asks the court to determine her rights under said law, and for the compensation to which she is entitled under the provisions of said law.

The rights of the parties hereto must be determined from the proper construction to be placed upon Section 35 of the workmen's compensation act of 1913, as found in volume 103, Ohio Laws, page 72, being the law in force at the time the alleged cause of action arose. The statute reads as follows:

"In case the injury causes death within the period of two years, the benefits shall be in the amounts and to the persons following:

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"1. If there be no dependents, the disbursements from the state insurance fund shall be limited to the expenses provided for in section forty-two hereof.

"2. If there are wholly dependent persons at the time of the death, the payment shall be sixty-six and two-thirds per cent. of the average weekly wages, and to continue for the remainder of the period between the date of the death, and six years after the date of injury, and not to amount to more than a maximum of thirty-seven hundred and fifty dollars, nor less than a minimum of one thousand five hundred dollars.

"3. If there are partly dependent persons at the time of the death, the payment shall be sixty-six and two-thirds per cent. of the average weekly wages, and to continue for all of such portion of the period of six years after the date of the injury, as the board in each case may determine, and not to amount to more than a maximum of thirty-seven hundred and fifty dollars.

"4. The following persons shall be presumed to be wholly dependent for support upon a deceased employee:

"(A) A wife upon a husband with whom she lives at the time of his death.

"(B) A child or children under the age of sixteen years (or over said age if physically or mentally incapacitated from earning) upon the parent with whom he is living at the time of the death of such parent.

"In all other cases questions of dependency, in whole or in part, shall be determined in accordance with the facts in each particular case existing at the time of the injury resulting in the death of such employee; but no person shall be considered as dependent unless a member of the family of the deceased employee, or bears to him the relation of husband or widow, lineal descendant, ancestor, or brother or sister. The word 'child' as used in this act, shall include a posthumous child, and a child legally adopted prior to the injury."

It is contended by counsel who filed the demurrer that under the allegations of the petition and a proper construction of the word "dependent," as found in the statute under consideration, that the plaintiff is not entitled to compensation, because at the time of the injury and death of the decedent, who was the husband of plaintiff, they were not living together, actually or constructively, and that the husband must have contributed to the support of his wife at or near the time of his death in order in

law to make plaintiff a dependent and entitled to participate beneficially under the workmen's compensation act.

Let us first inquire what is meant by "dependent," as the word is used in this statute. The commonly accepted meaning of the word is, one who looks to another for support, help or favor.

The crux of the case seems to center in the word "dependent," as used in the statute heretofore referred to. A wife is a natural dependent—a fact that is universally conceded—and the dependency of the wife on the husband is continuous while the marital relation exists, unless by some act of herself or by operation of law such dependency ceases.

Then let us inquire as to whether or not the claim of defendant's counsel is sound, that because the wife was several thousand miles away from her husband she is not entitled to benefits under the statute, although she had made two attempts to cross the Atlantic ocean, leaving her home in Italy to come to America and join her husband but for some reason not being permitted to do so, and although her husband had sent her money from time to time and as a matter of fact and in law was his wife at the time of his death. In the face of these facts we can not agree with the claim of counsel for defendant.

Learned counsel for defendant in their brief say:

"In March, 1912, after living with wife number two in the state of West Virginia for about three years and three months Musselli left her and came to the state of Ohio. He had contributed nothing to the support of his wife and child in Italy since the month of January, 1909, and nothing toward the support of his West Virginia wife and child since March, 1912.

The question involved in this case, and the question which was submitted before the Industrial Commission of Ohio, is whether or not the wife and child residing in the kingdom of Italy, at the time of the death of Raphael Musselli, the husband and father, are dependents of said decedent under the Ohio Workmen's Compensation Law, and whether they were dependent upon said decedent for their support at the time of the injury which caused his death.

* * * * *

"The facts in this case clearly indicate that there was neither a voluntary or mutual agreement to live separate and apart, but

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that there was an abandonment of the marital relations, both legal and moral, by the husband of this plaintiff, and that there existed no reasonable expectations that the relation of husband and wife would ever be resumed, and that under no circumstances under the facts in this case could the plaintiff and the decedent be considered to be either actually or constructively living together. We think that the fact that the decedent had contracted a bigamous marriage is conclusive proof of abandonment of the wife and child living in Italy."

We are unable to subscribe to this doctrine, and do not believe it to be sound from a legal standpoint, and most certainly has no foundation upon which to stand from a moral point of view.

It must be conceded that the provisions of the law under review are wise and humane, and were enacted for the purpose of furnishing the means of support for the widows, children and dependents of employees who might lose their lives while engaged in some labor or work in an endeavor to obtain the means of support for those near and dear to them. This law is for the benefit of the dependents of employees, and in view of this fact how can it be claimed with any force that the surviving widow in the present case should be barred of her rights under the law because her husband contracted a bigamous marriage, or because for a period of time he failed and neglected to send her money? What act has she done or failed to do that should prevent her from receiving the benefits of this law? Are the wrongful, unkind, unfaithful acts and misconduct on the part of her husband to be charged against the dutiful wife and mother, thereby preventing her from reaping the benefits of the statute that was specially enacted to take care of just such unfortunate persons? Certainly not.

We find no allegation in the petition that could be construed as an admission on the part of the plaintiff that she knew of any misconduct of her husband.

Courts have no function of legislation, but simply seek to ascertain the will of the Legislature in its enactment of a law and to give the language used that plain meaning which the words and sentences upon their face imply.

If we are to determine the intent of the Legislature in its enactment of the workmen's compensation act by the rule herein laid down, and applying the law as thus interpreted to ascertain whether or not the petition in this case is sufficient in law, we must and do say that it is.

Having so found, the judgment of the common pleas court is reversed, and this cause is remanded to that court with instructions to overrule the demurrer to the petition.

Judgment reversed.

POWELL, J., and SHIELDS, J., concur.

BINDING CHARACTER OF FRANCHISE PROVISIONS.

Court of Appeals for Franklin County.

CITY OF COLUMBUS V. THE OHIO STATE TELEPHONE CO.

Decided, July 2, 1917.

Telephone Company—Bound by Provisions as to Rates Contained in Its Franchise Ordinance—Use of Streets a Sufficient Consideration—Public Utilities Commission Without Power to Change Rates so Fixed—Unforeseen Costs and Unprofitable Operation Not Ground for Disregard of Rate Provisions—Section 614-2, et seq.

1. The use of the streets of a municipality by a telephone company, including the use of the subsurface for a conduit system, constitutes a sufficient consideration to render binding a provision in the franchise ordinance which fixes telephone rates within the corporate limits, and such a provision is enforceable both on behalf of the city and of private consumers located within its limits.
2. The public utilities act has no application to the provision of a franchise ordinance which fixes rates for a definite period.
3. Where the conduit system has been extended under orders from an authorized officer of the municipality, the company may equitably increase its rates within the limits permitted by the franchise ordinance in the event of conduit extensions.
4. A company which has accepted a franchise, including a provision as to rates, will not be permitted to retain the favorable provisions and at the same time eliminate one which unanticipated cost and unprofitable operation has rendered burdensome.

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H. L. Scarlett, City Solicitor, and *John R. King*, Assistant, for plaintiff.

Daugherty, Todd & Rarey and *George H. Jones*, contra.

BY THE COURT. (Kunkle, Allread and Ferneding, JJ., concurring.)

The city of Columbus brought this action against the Ohio State Telephone Company to enjoin the telephone company from putting into effect a proposed increase of its annual charge upon business phones from \$40 to \$54 per annum, less a discount of \$3 for payment in advance.

The petition alleges that the telephone company is operating under a franchise, ordinance and contract dated and taking effect in the year 1899 and continuing for a definite period of twenty-five years. The ordinance provides for the construction and maintenance of at least five miles of conduits and such extension of the conduit system as might be required by the city after five years from the completion of the exchange.

Under the ordinance and contract, the original telephone company, to whose rights the defendant succeeds, agreed that its charge for business phones should not exceed \$42 per annum, but provided that if the city at any time after five years from the installation of the exchange required the company to place additional wires underground that the charges for rentals above set forth might be equitably increased, but not exceeding one dollar per month per phone in excess of the charges above stipulated.

The petition alleges that the defendant entered upon and constructed its plant in the streets, alleys and avenues of the city and has constructed and now maintains more than twelve and one-half miles of underground conduits and that the city at no time required or demanded that the telephone company lay additional conduits over and above the five miles originally provided for in the ordinance. The city, therefore, contends that the telephone company has no authority to increase its telephone charges upon business phones above the \$42 per annum provided for in the ordinance.

An answer was filed in which the defendant, among other things, admits the terms and provisions of the ordinance and

that it is operating under said ordinance. It admits that it has constructed approximately ten miles of additional conduits, which it is now maintaining as a part of its telephone system and that it proposes to raise the schedule of rates on business phones to the sum of \$54 per annum, less a discount of \$3 for payment in advance and denies each and every other allegation.

The defendant sets out four additional defenses.

By the first defense it is claimed that the city of Columbus had no legal right to fix the telephone rates to subscribers and that such provision in the ordinance and contract were without consideration.

The second defense alleges, in substance, that the only authority to fix telephone rates is vested in the Public Utilities Commission, under Section 614-2 *et seq.* of the General Code; that the telephone company on the first day of January, 1917, filed this proposed schedule of rates with the Public Utilities Commission to become effective February 1, 1917, and that no objections, protest or complaint having been filed with the Public Utilities Commission to said rates, the same are now the only lawful rates which the defendant is authorized or permitted to charge.

The third defense alleges, in substance, that the city through its duly authorized officers and agents subsequent to the passage of the franchise ordinance, from time to time, notified this defendant to remove its poles and fixtures from certain streets, alleys and public ways and to place the same in conduits beneath the surface of said streets and that in obedience to said orders and notices, the defendant from time to time constructed more than ten trench miles of conduits in addition to the five miles originally provided for in the ordinance and has leased approximately three trench miles of conduits, in all of which it has placed and maintained its telephone wires in the operation of its plant. The defendant, therefore, claims the right to increase the charges upon business phones up to the maximum of \$54 per annum, as provided in the ordinance.

The fourth defense, in substance, avers that the telephone plant in the city of Columbus has increased in cost and expense far beyond what was contemplated by the parties at the time the

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franchise ordinance and contract become effective, making the operation of the plant under the franchise rates unprofitable and causing a loss to the company of substantially \$60,000 per annum and that by reason of such unanticipated situation, the telephone company is entitled to have the ordinance rates disregarded and equitable rates established in view of existing conditions.

The plaintiff demurred separately to the defense marked one, two, three and four of the answer and also to all of the answer, for the reason that the facts stated therein do not separately or jointly constitute a defense.

The demurrer was presented in the court of common pleas. The court of common pleas, in searching the record, found that the petition was defective and sustained the demurrer to the petition and dismissed the action. From this final judgment appeal was taken to this court.

The case is submitted here upon the demurrer to the answer and also upon a motion for a temporary injunction.

In support of the claim that the petition is insufficient to constitute a cause of action, it is claimed that the council of the city of Columbus had no authority to fix the rates and that the acceptance of such franchise including the rates was not binding as a contract because there was no consideration.

It must be observed that as a controlling feature, the city of Columbus by the franchise ordinance in controversy granted not only the right to maintain an overhead telephone system but to maintain conduits in the streets, alleys and public places.

The latter feature, we think, constitutes such a grant as would afford a consideration for the fixing of rates in the franchise ordinance.

In the case of *Zanesville v. The Gas Light Company*, 47 O. S., page 1, it was held that the fixing of rates by a gas company in the franchise ordinance was valid. That a right to the use of the streets furnished a valid consideration for the agreement of the company fixing prices at which a commodity was to be furnished to the city and to its inhabitants.

This doctrine was followed in the case of *City v. Gas Company*, 76 O. S., page 309, and was extended so as to include a stipu-

lated sum to be paid to the city as compensation for the use of the streets.

In the recent case of *Telephone Company v. City of Columbus*, 88 O. S., 466, the principle of the gas company case was extended to the case of a telephone company which obtained in the franchise the right to the use of the streets for conduit purposes.

The case of *Farmer v. Telephone Company*, 72 O. S., 526, is limited to the case of a telephone company which obtains its franchise to operate merely an overhead telephone system and does not apply to the case of a telephone company obtaining the use of the streets and alleys for a conduit system.

The right of a municipality to require a telephone or other public utilities company to fix rates in consideration of a franchise to use the streets, especially the sub-surface, is amply sustained by the weight of authority in other jurisdictions. *Dillon Municipal Corporations* (5th Ed.), page 1952; *Pond on Public Utilities*, Section 431; *McQuillan on Municipal Corporations*, Section 1741, and cases cited.

We are therefore of the opinion that under the facts stated in the petition the provisions of the franchise ordinance fixing the telephone rates is valid and may be enforced by the city in its own behalf and in the behalf of the consumers located within its corporate limits.

We therefore proceed to consider the sufficiency of the defenses numbered one, two, three and four of the answer.

Defense number one challenges the consideration of a franchise provision fixing rates upon the ground that there is no consideration. This proposition has already been discussed. That defense, in our opinion, is insufficient.

Defense number two relates to the filing of the rates with the Public Utilities Commission. Upon consideration of this defense, we have reached the conclusion that the Public Utilities Act does not apply to the ordinance under consideration, for the reason that this ordinance grants a franchise fixing the rates for a definite period. See Section 614-19, G. C.; *Village of Lexington v. Ohio Fuel Supply Co.*, 24 C.C.(N.S.), 537; *Taylor v. Hiles, Receiver*, 21 C.C.(N.S.), 391.

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We think this is also in harmony with the opinion of the Supreme Court in the case of *City of Cincinnati v. Public Utilities Commission*, decided May 15, 1917.

We think the third defense alleging the extension of the conduit system under notices and orders from the superintendent of fire and police telegraph of the city of Columbus constitutes a good defense and, if true, would authorize the company to increase its rates equitably above the \$42 per annum provided in the franchise ordinance and not exceeding \$12 per year.

We think the fourth defense in relation to the unanticipated cost and extension of the service is not a good defense.

The company accepted the ordinance and its right to maintain this system including conduits, is based thereon. Whether the company might under the situation set forth in this defense surrender its entire franchise we are not called upon to consider, but having accepted the franchise including the provision as to the rates, we think that they are not now justified in disregarding the provision as to rates and retain the favorable provisions of the ordinance.

We are therefore of the opinion that the demurrer should be sustained to so much of the answer as is embraced under numbers one, two and four and overruled as to so much of the answer as is embraced under number three.

In respect to the motion for a temporary injunction, we have considered the affidavits filed by the city in connection with those filed by the defendant in the court below. We have reached the conclusion that the question as to whether all or a part of the extension of the conduit system over and above the five miles provided for in the ordinance was made by notice or request of the city is considerably involved, and we do not deem it advisable to pass upon this question of fact upon these affidavits, but feel that as matter of public convenience no interference should be made by a temporary injunction at this time, but the case should be put at issue and finally tried and determined.

The motion for a temporary injunction is therefore overruled and the demurrer to the first, second and fourth defenses of the answer sustained and as to the third defense overruled.

VALIDITY OF AN ALLOWANCE OF ALIMONY.

Court of Appeals for Hamilton County.

VIRGINIA LAPE V. ELMER LAPE.

Decided, January 28, 1918.

Divorce and Alimony—Allowance to Wife—Not a Charge on Future Earnings of the Husband—Modification of Allowance—Presumption as to Regularity of Proceedings.

1. An allowance of alimony to a wife can not be based on future personal earnings or wages of the husband, and where the allowance is made in connection with a decree for divorce to the wife on account of the aggression of her husband, it must be based on property owned by him at the time the decree is granted.
2. But on application for a modification of an allowance of alimony payable in weekly installments, it will be presumed, in the absence of a showing to the contrary, that the court proceeded in accordance with law and found the husband to be possessed of property out of which the allowance could be legally decreed.
3. Section 11991, General Code, authorizes a decree of alimony in weekly payments of specified sums.

Bolsinger, Kuhn & Bolsinger, for plaintiff in error.

Owen N. Kinney, contra.

HAMILTON, J.

On September 23, 1913, plaintiff in error was granted a divorce from defendant in error, together with permanent alimony in the sum of six dollars per week, by the Insolvency Court of Hamilton County, Ohio.

On June 9, 1916, defendant in error, defendant below, filed a motion in that court to modify the alimony decree, and upon the hearing of said motion the court sustained the same and modified the decree by terminating the alimony.

The plaintiff, plaintiff in error here, prosecutes error to this court.

The only question urged by counsel for defendant in error is: Can the trial court, upon the granting of a divorce, decree ali-

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mony by way of payment of a specified sum per week? It is not claimed that the decree should be modified on account of any changed conditions justifying same.

In the instant case a divorce was granted Virginia Lape with a decree for alimony as follows:

“The plaintiff is hereby allowed as reasonable permanent alimony the sum of six (\$6) dollars per week beginning September 13, 1913, and payable on each Saturday thereafter.”

It will be noted that the decree did not provide that the payments should be made “Until the further order of the court,” and it is therefore not subject to modification, if legally authorized under the statute, unless changed conditions on the part of either or both of the parties were shown to exist justifying such modification.

The law is well settled that jurisdiction to decree alimony is such, and such only, as is given by statute. This is true whether the action is one for divorce and alimony, or for alimony only. The power in the court to decree alimony where a divorce is granted the wife for aggression of the husband, is provided for by Section 11990, General Code, which is as follows:

“When a divorce is granted because of the husband’s aggression, by force of the judgment the wife shall be restored to all her lands, tenements and hereditaments, not previously disposed of, and the husband barred of all right of dower therein. If she so desires the court shall restore to her any name she had before such marriage, and allow such alimony out of her husband’s property as it deems reasonable, having due regard to property which came to him by marriage and the value of his real and personal estate at the time of the divorce.”

The method of payment of “such alimony” is provided for by Section 11991, General Code, as follows:

“Such alimony may be allowed in real or personal property, or both, or by decreeing to her such sum of money, payable either in gross or installments as the court deems equitable. If the wife survives her husband, she also shall be entitled to her right of dower in real estate not allowed to her as alimony, of

which she was seized during the coverture, and in which she has not relinquished her right of dower."

It will be seen from a plain reading of Section 11990, that where a divorce is granted the wife on account of the aggression of the husband alimony can be allowed only out of her husband's property owned by him at the time of the granting of the divorce, and can not be based upon future personal earnings or future wages. Future personal earnings or future wages can not be considered as property, as was held in *In re Home Discount Co.*, 147 Fed., 538-548. The fourth paragraph of the syllabus in this case contains the following language:

"A bankrupt's right to earn wages in the future and dispose of the fruits of his labor is not 'Property' as that term is used in Bankr. act, July 1, 1898, Chapt. 541, paragraph 70, 30 Stat., 565, vesting all the bankrupt's property not exempt in his trustee," etc.

Bouvier's Law Dictionary defines "property" as "The right and interest which a man has in lands and chattels to the exclusion of others."

Also, the same authority gives:

"Property is said to be real and personal property."

It is therefore plain that by no stretch of the imagination, nor by any strained construction of the term "property," could it be claimed that future personal earnings or future wages come within the meaning of the term "property" as used in the statute.

It is urged that the case of *Frickel v. Granger*, 83 O. S., 101, supports the proposition that it is within the jurisdiction of the court to base a decree for alimony on future personal earnings and future wages. We do not so construe that case. The first paragraph of the syllabus is as follows:

"Alimony is not due and payable as debt, damages or penalty; but is an award by the court upon consideration of equity

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and public policy and is founded upon the obligation, which grows out of the marriage relation, that the husband must support his wife, which obligation continues after legal separation without her fault.”

This proposition is entirely reconcilable with the view that a decree for alimony must be based on property owned by the husband at the time of the granting of the divorce.

The court decided what alimony was, and why it was provided, and finds that under the marriage relation there remains an obligation on the part of the husband after the dissolution of the marriage contract, which obligation is to the effect that the wife after divorce should not be turned out into the world penniless while the husband retained all of their joint accumulation, but that the obligation continued after legal separation, to the extent that the court could by a decree by way of alimony permit the wife to take away with her such part of her husband's property as the court might deem equitable and proper.

It follows that a decree for alimony to the wife, where a divorce is granted because of the aggression of the husband, must be based on property owned by the husband at the time of the granting of the divorce; and that a decree for alimony based on future personal earnings or future wages is not authorized under the statute.

We are of the opinion that, having granted to the wife a divorce on account of the aggression of the husband, and finding the husband to have property out of which alimony may be decreed, the court under Section 11991, General Code, has jurisdiction to order such alimony paid in weekly payments or other installments as it may deem proper. We hold that decreeing a specified sum to be paid each week is decreeing a sum of money within the meaning of the statutes. In such cases, the jurisdiction of the court is continuing and ambulatory in its nature, and a decree for weekly payments of a specified sum is as effectual as if a new decree for such specified sum was entered separately each week upon a weekly application during the continuance of the decree.

In the instant case the trial court at the time of granting the divorce had power to decree alimony by way of payment of a specified sum each week, provided the court found the husband to be possessed of property out of which the sum was allowed. The record discloses that at the hearing of the application to modify the decree, it was admitted that at the time of the original hearing of the case the husband was possessed of both real and personal property, but the record does not disclose what facts with reference to this property were shown to the trial court, and in the absence of anything in the record to show the contrary it will be presumed that the court proceeded according to law and found the husband to be possessed of property out of which alimony could be legally decreed.

The judgment modifying the decree and discontinuing the alimony will be reversed and held for naught.

JONES, P. J., and GORMAN, J., concur.

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**DISTRIBUTION OF STATE DEPOSIT DIRECT TO
OHIO POLICY HOLDERS**

Court of Appeals for Franklin County.

EDWARD C. TURNER, ATTORNEY-GENERAL OF OHIO, ON BEHALF OF
FRANK TAGGART, SUPERINTENDENT OF INSURANCE OF
OHIO, v. THE UNION CASUALTY INSURANCE
COMPANY OF PHILADELPHIA.

Decided, November 30, 1917.

*Insurance—Procedure Where a Foreign Insurance Company Has Be-
come Insolvent—State Deposit Distributed Directly to Ohio Policy
Holders—Status of Claims Not Filed Within the Time Fixed—
Recommendations of Administrative Officials as to Statutory Amend-
ments Not Conclusive in Determining Legislative Intention—Sec-
tion 641.*

1. The deposit made by a foreign insurance company with the state superintendent of insurance as a prerequisite to doing business in Ohio should be administered, in the event of the insolvency of the insurance company, by said superintendent of insurance under the direction of the Ohio court to Ohio policy holders directly, instead of being turned over to the legal representatives of the insurance company in the state of its domicile.
2. The statutory provision, fixing a time within which claims may be filed in such a case, is not a statute of limitations, but merely fixes a time when the court may proceed with their consideration and distribution of the fund; and it is within the discretion of the court in a proper case to open up a default and permit a tardy claimant to file his claim for consideration on its merits.
3. Recommendations made by state administrative officials as to statutory amendments proposed to the Legislature are not conclusive in determining the legislative intention in the adoption of such amendments.

Vorys, Sater, Seymour & Pease, for appellants.

*White, Johnson, Cannon & Neff, W. L. Parmenter, Gordon,
Morrill & Ginter, Morton, Irvine, Turner & Blanchard, Halfhill,
Quail & Kirk, Aaron A. Ferris and L. H. Shipman*, contra.

KUNKLE, J.

The Attorney-General of the state of Ohio brings this action under Section 641, General Code, for the purpose of determining the rights of the policy holders of the Union Casualty Insurance Company of Philadelphia in and to a certain deposit of \$50,000 made by said company with the superintendent of insurance of the state of Ohio, as required by Section 9510, General Code.

It is conceded that the said insurance company is insolvent, and the controversy arises between the receiver appointed in the state of Pennsylvania, the domicile of said company, and also a certain policy holder of Pennsylvania, upon the one hand, and upon the other hand by various policy holders of said insurance company, residents of the state of Ohio, who claim the said fund by virtue of contracts made within the state of Ohio.

We have carefully considered the very helpful briefs which have been filed by counsel. We shall not undertake to discuss in detail the authorities and statutes cited therein, but will merely announce the conclusion at which we have arrived, after an examination of such authorities and statutes.

In brief, the questions which are presented for determination are:

(1). Has the insurance commissioner of Pennsylvania, acting as receiver of said company in the state of its domicile, any right to the fund in question?

(2). Should the funds realized from said deposit of \$50,000 be applied primarily to the payment of the liability in favor of the Ohio policy holders, or should it be applied to the payment of the liability of all policy holders, irrespective of where they may reside?

The deposit in question was required by Section 9510, General Code, and the provisions of said section, in so far as they are pertinent to the questions in issue, are as follows:

“A company may be organized or admitted under this chapter to * * * guarantee the performance of contracts other than insurance policies, and execute and guarantee bonds and undertakings required or permitted in all actions or proceedings, or by law allowed; make insurance to indemnify employers against

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loss or damage for personal injury or death resulting from accidents to employees or persons other than employees and to indemnify persons and corporations other than employers against loss or damage for personal injury or death resulting from accidents to other persons or corporations. But a company of another state, territory, district or county admitted to transact the business of indemnifying employers and others, in addition to any other deposit required by other laws of this state, shall deposit with the superintendent of insurance for the benefit and security of all its policy holders, fifty thousand dollars in bonds of the United States or of the state of Ohio, or of a county, township, city or other municipality in this state, which shall not be received by the superintendent at a rate above their par value. The securities so deposited may be exchanged from time to time for other securities. So long as such company continues solvent and complies with the laws of this state it shall be permitted by the superintendent to collect the interest on such deposits."

Sections 641, 642 and 643, General Code, define the procedure which shall be had in case of the insolvency of the company making the deposit. These sections are as follows:

"Section 641. If any company, corporation, or association required by law to make a deposit with the superintendent of insurance, or other state officer, to secure the contracts of such company, corporation or association, or for any other purpose, fails to pay any of its liabilities upon such contracts, or other obligations, according to the terms thereof after the liability thereon has been determined, or if such company, corporation, or association, having ceased to do business within this state, leaves unpaid any such liability or has become insolvent, the attorney-general of the state, on behalf of the superintendent of insurance, or such other officer, and upon the application of any person entitled to participate in such deposit, or the proceeds arising therefrom, shall commence a civil action in the Court of Common Pleas of Franklin County, making the company, corporation, or association, a party defendant, to determine the rights of all parties claiming any interest in such deposit, to subject the deposit to the payment or satisfaction of all liabilities and to distribute such fund among the persons entitled thereto.

"Section 642. Upon the filing of the petition in such case, the superintendent of insurance, or other officer, shall cause to be published for six consecutive weeks in three papers of general

circulation within the state, one of which shall be published at the seat of government, a notice containing a succinct statement of the object and prayer of the petition in such action, and the time within which persons claiming to have an interest in such fund shall be required to answer.

"Section 643. The clerk of such court shall forward a copy of such notice to the last known address of such company, corporation or association. The code of civil procedure shall govern such proceedings in so far as it is applicable, and upon the hearing of the cause, such order, judgment or decree shall be entered by the court as is deemed just and equitable."

Section 656, General Code, reads as follows:

"Section 656. When any insurance company or corporation other than life, which has made a deposit with the superintendent of insurance, intends to discontinue its business in this state, the superintendent, upon application of such company or corporation, shall give notice at its expense of such intention at least once a week for six weeks in three newspapers of general circulation in the state. After such publication, the superintendent shall deliver to such company or association its securities held by him, if he is satisfied by the affidavits of the principal officers of the company and on an examination made by him or by some competent, disinterested person or persons appointed by him, if he deems it necessary that all debts and liabilities which are due, or may become due, upon any contract or agreement made with any citizen or resident of the state of Ohio, are paid and extinguished."

From a consideration of the said statutes and the authorities, we think the law of this state is, that the said fund so deposited should be administered by the superintendent of insurance of this state, under the direction of the court and should be distributed directly to the policy holders entitled to share therein.

The fact that the fund is claimed by an assignee or other representative of an insolvent corporation does not supersede the jurisdiction of the court to order the distribution made by the superintendent of insurance directly to the policy holders.

In the case of *State, ex rel, v. Matthews*, 64 O. S., p. 419, the syllabus is as follows:

"1. Where securities have been deposited with the superintendent of insurance, by an insurance company, to be held by

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such superintendent in trust for the benefit and protection of, and as security for, the policy holders of such company, the assignee of such company, under our insolvent laws, can not recover such securities from such superintendent without first showing that such company is no longer liable to any of its policy holders.

"2. It is the official duty of such superintendent, in the event that such company becomes insolvent, to act, and perform his trust, by distributing the funds so deposited with him, *pro rata* among the several policy holders, and when their just claims shall all be satisfied, to pay the balance, if any, to the company, or its assignee or other successor." See also 43 O. S., 359.

In view of the above decisions, we are clearly of the opinion that, as previously stated, the fund in question should be administered in the present proceedings, and should be distributed directly to the policy holders entitled thereto, and that the same should not be paid to the representative of the insurance company appointed in the state of Pennsylvania.

In regard to the claim of James L. Stewart, the policy holder residing in the state of Pennsylvania, we are of opinion that his failure to file his claim within the time fixed by the public notice of the superintendent of insurance does not bar a consideration of the merits of his claim.

We think the provision fixing the time for filing claims, merely fixes a "rule day" and that the same was subject to be opened up, in a proper case, at the discretion of the court having jurisdiction in the case, and under the rules of civil procedure. We do not think this provision was intended as a statute of limitation, but that it merely fixed a time when the court might proceed to the consideration of the claims and the distribution of the fund.

This brings us to the question as to whether the foreign policy holder is entitled to participate in the distribution of the said fund so deposited.

This court formerly had before it for consideration, in the case of *Hogan, Attorney-General, v. Empire State Surety Company*, the question now presented. In that case this court stated:

"It is evident, however, that the deposit provided for in Section 9510 was intended to be held for the benefit of the policy holders

whose rights grow out of contracts made and business transacted in the state of Ohio."

We have carefully considered Sections 9510, 641, 642, 643 and 656, General Code, as they existed at the time the rights of the Ohio claimants to this fund accrued, and have also examined other sections of the statutes in *pari materia* with the sections above quoted, and after such consideration, we can not escape the conclusion that the said sections of our code, when read together, reflect in intention upon the part of the Legislature to require said deposit to be held for the primary benefit of Ohio policy holders. Where the Legislature provides for a deposit as a condition precedent to the right of a foreign corporation to do business within the state, we think the primary inference is that such deposit was required for the purpose of protecting the policy holders whose policies were issued within the state, and in order to extend the benefit of such deposit to the general policy holders of the company, we think the statute should clearly express such intention.

It is urged that the amendment to Section 9510, General Code, of date April 25, 1904, striking out the provisions as to the policy holders residing in this state and inserting the provision "for the benefit of all its policy holders," clearly shows an intention upon the part of the Legislature to extend the protection of the deposit to all the policy holders of the company irrespective of the state wherein such policies may have been issued.

If Section 9510, General Code, was the only section to be considered, then there would be much force in this contention, but when all the statutes relating to such deposit, and the distribution or discontinuance of business are considered, then we think it does not appear that the Legislature intended to extend the benefit of such deposit to policy holders generally.

Counsel for appellants call attention to the recommendations of certain administrative officers of the state, in favor of the amendments in question, to the various statutes under consideration. We are of opinion that such recommendations are not conclusive, but that the real intention of the Legislature must

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be deduced from the various acts of the Legislature relating to the deposit under consideration.

Entertaining these views, the demurrers should be sustained.

ALLREAD, J., and FERNEDING, J., concur.

**SECONDARY EVIDENCE MADE COMPETENT ONLY
BY EXIGENCY OF PROOF.**

Court of Appeals for Lucas County.

JOSIAH B. HARTMAN V. THE TOLEDO RAILWAYS & LIGHT
COMPANY.

Decided, 1917.

*Evidence—Circumstantial Character of Evidence of Habit—Competency
of Secondary Evidence.*

Evidence of the habit of a person being circumstantial and secondary in character, its admission is largely within the discretion of the court, and when there is primary evidence of a fact desired to be proven, there is ordinarily no necessity for resort to secondary evidence to establish the fact, and in the absence of some necessity for the introduction of such evidence to meet some exigency of proof, it will be rejected.

*Charles H. Masters and Kohn, Northup & McMahon, for
plaintiff in error.*

Tracy, Chapman & Welles, contra.

CHITTENDEN, J.

Error to the court of common pleas.

The plaintiff brought an action to recover damages because of personal injuries claimed to have been sustained through the negligence of the defendant. The jury returned a verdict in favor of the defendant and judgment was entered thereon. A reversal of this judgment is asked in this court on the ground

that certain material evidence offered on behalf of the plaintiff was excluded by the trial court.

On November 8, 1913, the plaintiff was a passenger upon one of the cars of the defendant company. The plaintiff claims that when he was within about a block from the place where he desired to alight he stepped into the front vestibule of the car preparatory to leaving the car when it should make a stop at the street where he desired to get off. He alleges that when he entered the vestibule of the car the motorman operating the car, "intentionally, negligently and carelessly struck and pushed him with great force so that he was violently thrown from said car upon the brick pavement and while the car was still in motion," and as a result thereof he received the injuries for which he seeks to recover. It is shown by the evidence that the plaintiff was formerly an employee of the defendant and a friend of the motorman operating the car.

The plaintiff testifies, in substance, that when he went into the vestibule he was struck on the neck by the motorman and was thereby thrown from the car. The testimony of one other witness was to the effect that thereafter she heard the motorman say that he didn't mean to push that man off and it was only an accident if he did push him off. Another witness testifies that he heard the motorman say, "I didn't mean to hit him." The defendant offered the evidence of the motorman who denied that he struck, slapped or pushed the plaintiff, and denied making the statements attributed to him, and said that he saw a shadow which caused him to believe that the plaintiff was falling, and that he attempted to reach him to prevent the fall but was unable to do so. The defendant also offered the evidence of several eye-witnesses who testified that the motorman did not slap, strike or push the plaintiff, but that the plaintiff evidently lost his balance as the car was passing through a curve of a switch, and that as he began to fall the motorman reached out with the evident intention of attempting to prevent him from falling.

The plaintiff when putting in his evidence in chief undertook to prove that the motorman had a general habit of slapping or

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striking his friends and acquaintances when speaking to them. One witness who had known the motorman for several years was asked this question: "You may state what you have observed Humphries (the motorman) do while he was running the car and you were conductor on it, in slapping persons upon the back or other parts of their person when speaking to them." The objection to this question was sustained. Counsel for the plaintiff stated to the court that he claimed the evidence was competent in corroboration of the act of the motorman complained of, and offered to prove by the witness and other witnesses that this motorman's general habit and custom, both while operating his car and at other times while off duty, was to slap or strike a man at times very hard when speaking to him. It is claimed that the exclusion of this evidence was erroneous and prejudicial to the rights of the plaintiff.

In support of this contention counsel for plaintiff cite some language of the Supreme Court of Ohio in the case of *Rumbaugh v. McCormick*, 80 O. S., 211, found upon page 217. The language quoted and said to be applicable to this case consists of a quotation from Section 68, *Wigmore on Evidence*, and is as follows:

"The character or disposition of an animal is no less relevant than that of a human being, as indicating his probable conduct on a particular occasion, and it is open to none of the objections of auxiliary policy which affect the use of a party's character. It is therefore commonly conceded to be admissible. The hesitation sometimes observed in the rulings has been due to the time at which the disposition is predicated in the offer; but here, as with human character, the existence of a trait at a given time is evidence that it existed also for a reasonable time before and afterwards, and within liberal limits should therefore be received."

An examination of the case cited discloses that the Supreme Court did not have under consideration and was not discussing the admissibility of evidence of the kind and character sought to be introduced by the plaintiff in this case. In the case under consideration by the Supreme Court the plaintiff sought to recover damages inflicted upon a flock of sheep, alleged to have

been caused by a dog owned and harbored by the defendant who lived upon an adjoining farm. It was there held competent to prove that the dog had acquired the habit of attacking sheep, in support of the disputed allegation that he attacked and injured sheep on the particular occasion.

It has become quite well settled that in certain actions evidence of character and disposition is competent, and this is especially true when applied to animals. It is not claimed in this case that the motorman was of a violent or dangerous disposition or character, and the evidence sought to be introduced was not for the purpose of making any such proof. The distinction between character and disposition of individuals, and of a habit, is apparent and is made by text-writers treating of the subject of evidence. The quotation from *Wigmore on Evidence*, above mentioned, is from a paragraph treating of the character of animals, and in the course of the paragraph quoted Mr. Wigmore refers to Section 60 of the same work which also treats of character. That author's treatment of the subject of habit is found in Section 92. He recognizes that under certain circumstances a person's habit is of some probative value. Two of the cases cited by him have more to do with the subject of custom than of habit. The other case cited by him, *State v. Railroad*, 52 N. H., 528, 532, more definitely deals with the question of habit. The New Hampshire case has sometimes been taken as the basis for a statement that habit is competent evidence. We call attention, however, to the case of *Parkinson, Adm'r, v. The Nashua & Lowell R. R. Co.*, 61 N. H., 416. The opinion in that case begins with this statement:

"Although it is quite generally held elsewhere in actions for negligence, that evidence of other specific instances of negligence on the part of either party is not competent, because raising a collateral issue, yet in this state a different rule prevails and has become established in cases where the evidence is conflicting; and it is here held to be competent to show that the party charged with negligence had performed or omitted the same act in the same way before, as tending to show that he did or omitted the act at the time in question, on the ground that a person is more likely to do a thing in a particular way, as he is in the habit of doing or not doing it."

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The court then cites the 52 New Hampshire, from which Mr. Wigmore quotes, together with other New Hampshire cases. It will be observed that the Supreme Court of New Hampshire recognizes that the rule laid down in that state is not in accord with the current of authority in this country. Mr. Wigmore further states in Section 92 that:

“There is, however, much room for difference of opinion in concrete cases owing chiefly to the indefiniteness of the notion of habit or custom. If we conceive it as involving an invariable regularity of action, there can be no doubt that this fixed sequence of acts tends strongly to show the occurrence of a given instance. But in the ordinary affairs of life a habit or custom seldom has such an invariable regularity. Hence it is easy to see why in a given instance something that may be loosely called habit or custom should be rejected because it may not in fact have sufficient regularity to make it probable that it would be carried out in every instance or in most cases. Whether or not such sufficient regularity exists must depend largely on the circumstances of each case.”

He then calls attention to the difficulties that arise in connection with such evidence because of its close relation to that of character, and of its becoming obnoxious to the rule against the use of a party's character in civil cases.

The entire subject now under consideration is learnedly discussed by Mr. Chamberlayne in the *Modern Law of Evidence*, Volume 4, Chapter 46, beginning with Section 3150.

It is obvious that evidence of habit is circumstantial and secondary in character, and is within the rule that its admission is largely within the discretion of the presiding judge. When there is primary evidence of a fact desired to be shown, there is ordinarily no necessity for resort to secondary evidence to establish that fact. Under such circumstances the introduction of secondary evidence involves the danger of misleading or confusing the jury by the raising of collateral issues. The trial court will consider this danger, together with any other circumstances affecting his discretion, in passing upon the admissibility of such evidence. *Chamberlayne, Modern Law of Evidence*, Volume 4, Sections 3154 and 3159; *6 Thompson's Commentaries on the*

Law of Negligence, Section 7883. The introduction of evidence that involves collateral issues always involves the danger of trying out not what happened on the particular occasion that furnishes the basis for the suit, but what happened on other occasions. Therefore, in the absence of some necessity for the introduction of such evidence, it will be rejected.. As said by Mr. Chamberlayne, Section 3198:

“In other words, where there is direct evidence to the same effect, or in general when evidence of habit is not required to meet some exigency of proof, the propriety of rejecting the evidence seems an administrative common-place in most cases.”

After further discussion of this subject in the section last cited, quotation is made from the decision of the Court of Appeals of New York in the case of *Zucker v. Whitridge*, 205 N. Y., 50. In that case evidence of the habit of the injured person was sought to be introduced; but we are unable to see any proper distinction to be made in the principle governing the admission of habit of the injured person and of the habit of the defendant or its employees. The court of Appeals, after an exhaustive review of the cases upon the subject and of several text books, reached the conclusion that the “weight of authority seems to be against admitting evidence of general conduct under proven circumstances to show conduct of the same kind under similar circumstances on a particular occasion, when there were eye-witnesses of the occurrence, including the person injured if he survived the accident.” They expressly declined to express an opinion as to the competency of such evidence when there are no eye-witnesses of the event. We think proper to quote at some length from the concluding statements in that opinion:

“A question of evidence, to some extent, is a question of sound policy in the administration of the law. Sometimes it is necessary to weigh the probative force of evidence offered, compare it with the practical inconvenience of enforcing a rule to admit it, and decide whether, as matter of good policy it should be admitted. Uniform conduct under the same circumstances on many prior occasions may be relevant as tending somewhat to show like conduct under like circumstances on the occasion in

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question. All relevant evidence, however, is not competent. Hearsay, although relevant, is held incompetent from public policy, because there is safer and better evidence to establish the fact. Parol evidence to vary a written agreement is relevant but incompetent, because sound policy requires that the writing should be presumed to express the final agreement of the parties. So, assuming the evidence in question to be relevant, I think it should be held incompetent under the circumstances, because its probative force does not outweigh the inconvenience of a multitude of collateral issues not suggested by the pleadings, the trial of which would take much time, tend to create confusion and do little good. As was said by Chief Justice Peters in *Chase v. Maine Central R. R. Co.* (*supra*): 'In many litigations, under such a test, there would arise a wager of character which would as unfairly settle the dispute as did formerly the wager of battle. The rule of the average life is care, or else it would not long continue, yet the average man is conscious that he is not always careful, and, hence, habit on general occasions is uncertain evidence of care on a particular occasion. It is not enough of itself to establish the fact sought to be proved and at the most simply bears upon the probability. Habit is an inference from many acts each of which presents an issue to be tried and necessarily involves direct and naturally invites cross-examination. The circumstances surrounding each act present another issue, and thus many collateral issues would be involved which would not only consume much time, but would tend to distract the jury and lead them away from the main issue to be decided. From the want of previous notice the other party would not be prepared to meet such evidence, and after all the testimony of this character was in the fact would remain that, as no one is always careful, the subject of inquiry, although careful on many occasions, might have been careless on the occasion in question.'

The circuit court of this district reached a similar conclusion in the case of *W. & L. E. R. R. Co. v. Parker*, *Adm'r*, 9 C.C.(N. S.), 28, and a like result was arrived at by the Circuit Court of the Seventh Circuit in *Pennsylvania Co. v. Trainer*, *Adm'r*, 12 C. C., 66. See, also, *Baltimore & Ohio R. R. Co. v. Van Horn*, *Adm'r*, 21 C. C., 337.

The bill of exceptions discloses the evidence of several eyewitnesses of the accident to the plaintiff. We are unable to say that the trial court was guilty of any abuse of discretion in ex-

cluding the evidence tendered, even were it conceded that such evidence of habit might under some circumstances be admissible. We are furthermore of opinion that in view of the direct evidence, the probative effect of such circumstantial evidence of habit would not have been sufficient to have justified the jury in returning a verdict in favor of the plaintiff.

After a careful review of the record, and a somewhat extensive examination of authorities, we are unable to find any prejudicial error in the record, and the judgment will therefore be affirmed.

**VIOLATION OF A PARTNERSHIP AGREEMENT—WHEN
NOT ENJOINED.**

Court of Appeals for Franklin County.

M. LICHTENSTEIN v. MAX SILVERMAN.

Decided, April 25, 1914.

Window Cleaning—Partnership Agreement for Carrying on the Business of—Partnership Dissolved and Defendant, Contrary to Agreement, Does Some Work on His Own Account—Injunction Denied.

Injunction will not lie against one who has provided himself with a bucket and ladder and is engaging, without the assistance of employees, in the work of cleaning windows, contrary to a partnership agreement theretofore entered into, where it does not appear that he has solicited or proposes to solicit the work of any of the customers of the plaintiff, his former partner, the work being common labor and in no sense special, unique or extraordinary.

Schanfarber & Schanfarber, for plaintiff.

Harry Kohn, contra.

RICHARDS, J.

Appeal from the court of common pleas.

This action is brought for the purpose of enjoining the defendant from engaging in the window cleaning business in the

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city of Columbus, and from soliciting said business, and from doing any work or getting any work done, in connection with the window cleaning or general cleaning business in the city of Columbus.

The parties hereto entered into a contract of partnership on September 18, 1913, for the purpose of engaging in the cleaning business in Columbus. The defendant had no property, but had been theretofore engaged in the work of cleaning windows in that city, while the plaintiff had capital and was engaged, on a large scale, in the same business and in the same city. The partnership seems not to have been very successful, for it was only in effect a few weeks, and resulted in the bringing of this action in the common pleas court on October 31, 1913. The written contract between the parties provided that in the event of a discontinuance of the agreement or of the business, Silverman would not engage in the cleaning business or in any competing business to any cleaning concern in which Lichtenstein was interested, for a period of three years from the date of such discontinuance, in the city of Columbus, directly or indirectly, either as owner, employer, employee, agent or partner.

It is clear from the evidence in this case that after the parties ceased to continue in business as partners, the defendant engaged in the cleaning of windows himself in a small way in the city of Columbus. It appears that his only outfit was a ladder and a pail and a chamois skin. This elaborate equipment he carried from place to place in the city by hand, and the motive power in performing his labor was his own muscle. He had no other person in his employment, but it does appear from the evidence that on one occasion he employed a man for a brief period of time to wash certain windows; that occasion, however, was the day that this case was tried in the common pleas court, such trial necessitating the appearance of the defendant in court for the purpose of making his defense against the action brought by this plaintiff. The evidence shows that he has not solicited, and does not intend to solicit, the customers of the plaintiff.

The brief of counsel for plaintiff contains the following statements:

"It is not the purpose of this proceeding to enjoin the defendant from cleaning windows. It is not the purpose of this proceeding to enjoin the defendant from working as a common laborer. This can not be done. But it is the purpose of this proceeding to enjoin the defendant from carrying on the window cleaning business in a general way, and to enjoin the defendant from soliciting customers and engaging as an independent contractor."

The evidence in this case would not justify the court in granting an injunction against soliciting business from customers of the plaintiff, because it does not show that he has solicited, or contemplates soliciting, such persons. Neither does it show within any fair interpretation of the language of the contract between the parties, that he has engaged, or is about to engage, in the prohibited business other than as simply a common laborer. It is not an occupation which requires any special skill or ability, and the services are not of a unique character. A court of equity will not enjoin, under such circumstances, the performance of such common labor as the cleaning of windows.

I call attention to *Columbia College of Music and School of Dramatic Art v. Tunberg*, 116 Pac., 280, where the rule is concisely announced. See *Eureka Laundry Co. v. Long*, 146 Wis., 205, 131 N. W., 412; same case 35 L. R. A. (N.S.), 119. In the last citation the case may be found fully annotated. See also *Jewel Tea Co. v. Novak*, 146 Wis., 224, 131 N. W., 415.

We hold, therefore, that the petition of the plaintiff should be dismissed at his costs.

KINKADE, J., and CHITTENDEN, J., concur.

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**AUTHORITY OF TOWNSHIP TRUSTEES IN THE MATTER OF
PROVIDING DRAINAGE DITCHES.**

Court of Appeals for Williams County.

JOHN RAYMOND ET AL V. THE TOWNSHIP TRUSTEES OF MILLCREEK
TOWNSHIP, WILLIAMS COUNTY, ET AL.

Decided, October 26, 1916.

*Ditches—Purpose of Enactment of Ditch Laws—Provision for Drainage
and Assessment of Cost in Hands of Township Trustees—May
Employ an Engineer—Tribunals Designated by the Legislature
Will Not be Interfered With by the Courts, Unless.*

1. The ditch laws were enacted for the purpose of securing a systematic and proper drainage of the country, and it was the evident intention of the Legislature that the work should be conducted by the township trustees, with such engineering aid as is necessary to carry into practical and successful effect the project of drainage in a given territory and to equitably assess the cost thereof, and such trustees are authorized to employ an engineer to supervise and inspect the construction of a township ditch, and to report on the same to such trustees.
2. The courts will not interfere with the action of tribunals selected by the Legislature to perform certain duties, unless it is made apparent to the court that the action of such board or tribunal is such as to amount to fraud, bad faith, or a gross abuse of the judicial discretion reposed in such board or tribunal.

*Edward Gaudern, for plaintiff.**Newcomer & Gebhard, contra.*

CHITTENDEN, J.

Appeal from the court of common pleas.

This is an action to restrain the certifying of certain ditch assessments to the county auditor on the ground that certain items included in the assessments are excessive and illegal.

The trustees of Millcreek township located a township ditch, with certain branches, aggregating in length approximately three miles. John Mattoon was employed by the trustees as the engineer to locate, level and measure the course of the ditch, to

prepare plans and specifications therefor, to supervise and inspect the construction of the ditch and accept the same for the trustees. The bill of Mr. Mattoon approved by the township trustees contained an item of forty and one-half days at four dollars per day for surveying and leveling and making a report to the trustees, amounting to \$162. It is conceded that this total is not correct for the reason that the statute limits the amount of compensation that may be made by township trustees to engineers engaged in township ditch work to four dollars a day for field work and three dollars per day for inside work. The evidence in the case shows that eleven days were spent in the field and twenty-nine and one-half days in the office. Therefore, the bill should be corrected in this respect by computing the office work at three dollars per day instead of four dollars per day. The bill also contains an item of expense while engaged in the field work, of four dollars and fifty cents. We find no statutory authority for the allowance of this item and it will, therefore, be excluded.

The principal item in controversy is one of \$128 being the amount charged by the engineer for the supervision of the construction of thirty-two working sections of the ditch, allowing one day to each section. It is earnestly argued that there is no authority whatever for the allowance of pay for such services. The question as to the validity of the item must largely hinge upon a proper construction of Section 6612, General Code, which defines the duties of the trustees and empowers them to employ an engineer. So far as the section relates to the question here involved, it reads as follows:

“The trustees may employ an engineer to locate, level and measure the course of such ditch, and such other assistance as they need.”

Some light is thrown upon the section from which the above quotation is taken by Section 6619 of the General Code which provides the fees to be paid officers and others in the locating and establishing of township ditches. This section provides that engineers may be paid four dollars per day for locating and three dollars per day for making plat, profile and specifications. It is to be observed that the latter section provides pay for the

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making of a plat, profile and specifications, although Section 6612 does not specifically authorize the trustees to employ an engineer for that purpose.

The ditch laws were enacted for the purpose of securing a systematic and proper drainage of the country and it is evident that it was intended by the Legislature that the work should be conducted by the trustees with such engineering aid as should be necessary to carry into practical and successful effect the project of drainage in a given territory and equitably assessing the cost thereof. The drainage of a locality is essentially an engineering problem and is so recognized by the legislative enactments. Section 6612 as quoted indicates the legislative recognition of this statement by making provision for the employment of an engineer. In that section they specify the principal things to be done by the engineer, to-wit, level and measure the course of such ditch, and it being a matter of common knowledge that other engineering assistance may be needed it is by that section wisely left to the discretion of the trustees to employ such engineer to render "such other assistance as they need." The object to be attained by this legislation makes it manifest that this section should be read as though it contained the word "render" immediately preceding the word "such," so that the section would read:

"The trustees may employ an engineer to locate, level and measure the course of such ditch and render such other assistance as they need."

We can see no other construction of this section consistent with the purpose for which the section was enacted. When so construed it furnishes ample authority for the board of trustees of the township upon whom the duty of providing for proper drainage is imposed, to efficiently and in a business like manner discharge the duties thus cast upon them. This construction in no way deprives the township trustees of the power to employ axemen and chainmen to assist the engineer. The power to employ such assistants is clearly implied from Section 6619, General Code, which fixes the compensation of such employees, and furthermore such assistants to the engineer are but necessary incidents to the work that he is employed to do.

Certainly it would be inexcusable upon the part of the trustees to apportion the construction of a ditch and branches having a length of three miles, and permit its construction without giving it any supervision or inspection to know that the plans and specifications had been complied with. It would involve the independent labor of many different people on the various sections and supervision and inspection of such work are quite necessary in order that the completed ditch shall answer the purpose for which it is designed. If such inspection had been made by the trustees they would, under the statute, be allowed one dollar and fifty cents each per day, or a total of four dollars and fifty cents per day, for making this necessary inspection, and it is self-evident, therefore, that by employing the engineer in question, who is conceded to be expert in this line of work, not only was scientific and expert inspection and supervision secured, but it was secured at a less expense to the land owners than would be an inspection by the trustees themselves.

The record further discloses that all that was done in respect to the hiring of the engineer was in the presence of and with the knowledge of the plaintiffs in this case, and that it was done without any protest upon their part. The bill for services was presented to the township trustees and was approved by them at a meeting at which the evidence shows the plaintiffs were present, and they interposed no objection thereto. In view of these facts, it is difficult to see how the plaintiffs have the right to appear in a court of equity and ask the extraordinary writ of injunction to restrain the certifying of the bill, at least in so far as the work has been performed.

It is further claimed that even if the services were such that the trustees might legally pay for them, they are excessive; that the work should have been performed in much less time than that for which the charge is made. The duty of determining the correctness of the bill is by law devolved upon the trustees of the township.

The courts of this state are not authorized to, and ought not, interfere with the action of tribunals selected by the Legislature to perform certain duties, unless it is made apparent to the

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court that the action of such board or tribunal is such as to amount to fraud or bad faith or a gross abuse of the judicial discretion reposed in such board or tribunal. This principle of law is so thoroughly established that it is unnecessary to cite authorities.

The petition does not allege any bad faith upon the part of the trustees but only that they have been guilty of gross negligence in allowing the bill of the engineer for the amount stated therein. The burden of proof is upon the plaintiffs to show such an abuse of discretion as would justify the interference of a court of equity. We find that the evidence of the plaintiffs falls very far short of establishing any such state of facts as would justify an interference on the part of this court with the action of the trustees.

Finding, therefore, as we do, that there is statutory authority for employing an engineer to supervise and inspect the work, the allowance made by the trustees should be corrected by eliminating therefrom the item of four dollars and fifty cents for expense of the engineer, and the twenty-nine dollars and fifty cents, the amount of the excess charge for making plans and specifications, as hereinbefore stated. The apportionment should be modified as above indicated, and the defendants will be enjoined from certifying anything in excess of that amount.

RICHARDS, J., and KINKADE, J., concur.

ACTION AGAINST AN ADMINISTRATOR FOR SERVICES.

Court of Appeals for Coshocton County.

R. D. KEESEY v. JOHN E. GLASS, AS ADMINISTRATOR O. THE
ESTATE OF CARRIE L. LAHM.

Decided, July 2, 1917.

Charge of Court—Confusion in Instructions to the Jury as to the Nature of the Contract Sued on Action for Services Under a Contract Assumed to Have Been Implied.

In an action for recovery on a contract for services, it is prejudicial error in charging the jury to speak of the contract as implied, without any explanation as to what proof is required to establish an implied contract, but leaving the jury to infer that an implied contract could be established by the same evidence as an express contract, which evidence offered showed to be the character of the contract in suit.

*Joseph L. McDowell and W. S. Merrell, for plaintiff in error.
F. E. Pomerene and T. H. Wheeler, contra.*

HOUCK, J.

Error to the Court of Common Pleas of Coshocton County.

Error is here prosecuted to reverse the judgment of the common pleas court in this case.

The plaintiff brought suit to recover from the estate of Carrie L. Lahm, deceased, the sum of \$4,255, which he claimed to be the reasonable value of certain work and services done and performed by him for the said Carrie L. Lahm prior to her death. The services for which he seeks to recover were performed between the first day of March, 1911, and the 21st day of January, 1915, the answer filed being in substance a general denial. The cause was submitted to a jury upon the pleadings and the evidence, and the jury returned a verdict for the defendant, and a judgment being entered on the verdict, error is here prosecuted praying for a reversal of said judgment.

We have given this case careful consideration, and have read the bill of exceptions, and were materially aided in our examination of the record and the bill of exceptions by the very able

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oral arguments of counsel, as well as the written briefs in the case filed by them.

Plaintiff in error insists that the trial judge erred prejudicially to his rights in the premises in giving to the jury certain written charges before argument, as requested by the defendant. We think it necessary to discuss but two of these requests, namely, Nos. 2 and 3, which are as follows:

"No. 2. I charge you that this is a suit to recover from the estate of defendant's decedent compensation for his services alleged to have been rendered under an implied contract. Whether the contract is express or implied, the meeting of the minds of the parties upon its terms is necessary to the making of the contract. If the minds of the parties did not meet on any terms of agreement, there is no contract.

"No. 3. If you find from the evidence that at the time plaintiff went to live in decedent's home he did so under an agreement to render the services shown by the evidence to have been performed by him for decedent, and that he was to receive as compensation therefor his room and board, and with no provision for further or other compensation, then plaintiff can not recover in this action, and your verdict should be for the defendant."

When written requests of propositions of law are asked to be given to a jury before argument the trial judge must give the same if they are sound propositions of law pertaining to the issue or issues raised by the pleadings and applicable to the proven facts in the case; although a request may be sound, as an abstract proposition of law, yet the trial court would not commit error by refusing to submit it to the jury, unless such be clearly applicable to the issues to be determined and the facts in the case as established by the evidence.

The question then for our consideration and judgment is: Did or did not the trial judge err prejudicially to the rights of plaintiff in error in submitting to the jury such requests? We must answer this inquiry in the affirmative, and having done so it is our duty to assign our reasons for so doing, which briefly stated are as follows:

We think request No. 2 is clearly misleading and prejudicial to the rights of plaintiff in error. In clear language it states that the services alleged to have been rendered by the plaintiff for

the defendant were by reason of an implied contract, and then states, "whether the contract is express or implied, the meeting of the minds of the parties upon its terms is necessary to the making of the contract. If the minds of the parties did not meet on any terms of agreement, there is no contract."

If the contract was an implied one then it had no connection with an express contract. Then why should any reference be made to an express contract, if the plaintiff did not rely upon such to recover? The evidence necessary to establish an implied contract is very different from that required to prove an express contract. In an express contract all the terms and conditions are expressed between the parties, and they arrive at their agreement by words either oral or written, while in an implied contract some of the terms and conditions are implied by law by the conduct of the parties. Thus, where one performs for another, with his knowledge, consent and acquiescence, some useful or valuable service, however small it may be, that is commonly charged for, and the same is accepted, a promise to pay what the same is reasonably worth is implied. It will be observed that in the request now under consideration there is no explanation as to what proof is necessary to establish an implied contract, but in effect, at least, the language used would imply that the same proof would be necessary to establish an implied contract as is required in an express contract.

As to request No. 3, we will say as to the real force and effect of the language used—if we are able to properly analyze and interpret same—that the contract was an express one. Both of these requests are vague, uncertain and indefinite, and we think are very misleading and highly prejudicial to the substantial rights of the plaintiff in error.

If we apply the rule of law as herein laid down as a test to the above requests, we can reach but one conclusion, and that is that the common pleas court was in error in submitting them to the jury.

Finding error in the record prejudicial to the rights of the plaintiff in error, the judgment of the common pleas court is reversed and the cause remanded to that court for a new trial.

Judgment reversed.

POWELL, J., and SHIELDS, J., concur.

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Hamilton County.

DEFENSE OF JUDGMENT IN A FORMER ACTION.

Court of Appeals for Hamilton County.

FRANK L. McCORD v. JAMES W. McCORD ET AL.

Decided, January, 1916.

Action to Establish a Trust in Real Estate by Parol Evidence—Defense of Former Adjudication—Matters of Action and Defense Which Must be Deemed to Have Been Determined in Former Litigation.

Where a party is called upon to make good his cause of action or establish his defense, he must do so by all proper means within his control, and all matters of action and defense coming properly within the scope of the suit or action will be put at rest by the final determination of the action or suit, unless excepted by some provision of law or by the judgment or decree itself.

*Frank E. Wood, W. A. Hicks and S. A. Headley, for plaintiff.
Robertson & Buchwalter, contra.*

CHITTENDEN, J.

Appeal from the court of common pleas.

The plaintiff in this action seeks to establish by parol evidence a trust in certain real estate that had been deeded by his mother to his father, one of the defendants herein, by a deed absolute. It is claimed that this deed was made upon consideration that the property was to be held by the defendant, James W. McCord, during his lifetime, and to be by him willed to his children and grandchildren, in certain proportions.

One of the defenses interposed is that this action is barred by a former adjudication between the parties. This former suit between the parties is admitted, but it is claimed that it does not amount to a bar to the prosecution of this action. In the former action the plaintiff herein sought to have the same deed that is in question in this action set aside, on the ground that at the time of its execution his mother was mentally incompetent to execute the same, and that its execution was obtained through the undue influence and coercion of the grantee, his father. The result of the former trial was an adjudication by the court that the grantor was of sound mind, that no imposition was practiced

upon her, and that the execution of the deed was her free and voluntary act and conveyed to the grantee an estate in fee simple. This judgment was affirmed by the Supreme Court.

Among other averments, the petition contained the allegation that the mother died intestate and seized in fee simple of the property. This was denied by the answer, and the court found, upon all the issues joined, in favor of the defendant. This was a finding in favor of the defendant upon the issue thus raised as to the title of the mother. Manifestly, if the mother was not the owner of the property and the real estate was in fact the property of the defendant, then the conveyance from the wife to her husband was only transferring to him the property that belonged to him. The petition in the former case contained a prayer for all relief that the plaintiff might be entitled to in the premises, and in the journal entry in that case appears the following language:

"It is therefore considered, adjudged and decreed that the petition of the plaintiff be and the same is hereby dismissed at the costs of the plaintiff, and that the plaintiff be, and the same is hereby denied any and all relief, and that the defendants recover from the plaintiff their costs," etc.

The only evidence presented by the plaintiff in this case is certain admissions made by the defendant in a deposition taken in the former action and certain admissions made by him while testifying as a witness in the former action. There is, therefore, no evidence presented in this case that was not before the court at the former trial.

It is well settled in this state that where a party is called upon to make good his cause of action or establish his defense, he must do so by all proper means within his control, and that all matters of action and defense coming properly within the scope of the suit or action will be put at rest by the final determination of the action or suit, unless excepted by some provision of law. *Strangward v. American Brass Bedstead Company*, 82 O. S., 121; *Peterstine v. Thomas*, 28 O. S., 596; *Covington & Cincinnati Bridge Company v. Sargent*, 27 O. S., 233; *Roby v. Ransberger*, 27 O. S., 674; *Werner v. Cincinnati*, 3 C.C.(N.S.), 276, affirmed by the Supreme Court without report.

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The cases just cited are to the effect that when a matter is finally determined in an action between the same parties, by a competent tribunal, it is to be considered at an end, not only as to what was determined, but also as to every other question which the parties might have litigated in the case. The title to this property was the subject of inquiry in the former action, and it was the duty of the plaintiff to set up in that case every claim he had that in any wise affected the defendant's title, and if he failed to do so he could not thereafter have the question litigated in a subsequent action. We find that the former adjudication is a bar to the prosecution of this action.

This conclusion makes it unnecessary for us to pass upon the other questions presented in argument.

The decree will be in favor of the defendant, dismissing the petition at plaintiff's costs.

RICHARDS, J., and KINKADE, J., concur.

**RIGHT OF OHIO CREDITORS TO SHARE IN THE STATE DEPOSIT
OF A FOREIGN INDEMNITY COMPANY.**

Court of Appeals for Franklin County.

TIMOTHY S. HOGAN, ATTORNEY-GENERAL OF THE STATE OF OHIO,
ON BEHALF OF THE SUPERINTENDENT OF INSURANCE OF OHIO,
ROBERT M. SMALL, v. THE EMPIRE STATE SURETY COMPANY,
WILLIAM T. EMMET, SUPERINTENDENT OF INSURANCE OF THE
STATE OF NEW YORK, AND FREDERIC G. DUNHAM, SPECIAL
DEPUTY SUPERINTENDENT OF INSURANCE OF THE STATE OF
NEW YORK.*

Decided, April 1, 1916.

*Sureties—Deposit of Foreign Indemnity Company—Subject to Claims
of Creditors of Contractors Bonded by Such Companies—Regard-
less of Place of Execution of Either the Contract or the Bond.*

The federal act, extending the liability of a surety company upon the bond of a contractor to creditors for material and labor under his contract, fixes jurisdiction for enforcement of the rights of such creditors at the place where the contract is to be performed,

*For similar holding, see *Hogan v. Empire State Surety Co.*, 18 N.P. (N.S.), 380.

and taken in connection with the evident purpose of Section 9510 to protect rights growing out of contracts so covered, the deposit of a foreign indemnity company, made with the superintendent of insurance as a condition of doing business within this state, must be held to inure to the benefit of creditors for labor and material under contracts to be performed within this state and covered by a bond of such company, notwithstanding the contract and the bond guaranteeing its performance were executed outside of the state.

M. J. Wright and Booth, Keating, Peters & Pomerene, for the insurance department of the state of New York.

Tolles, Hogsett, Ginn & Morley, Hughes & Tripplehorn, Russell K. Bedgood, Cable & Cable, Mackenzie & Weadock, Ralph Mackenzie, C. J. Brotherton and Paul T. Landis, for intervenors.

KUNKLE, J.

This is an action wherein Timothy S. Hogan as Attorney-General brought suit under Section 641, General Code, to determine the rights of all persons claiming an interest in and to a certain deposit of \$50,000 made by the Empire State Surety Company, a New York corporation, with the superintendent of insurance of the state of Ohio, in order to obtain the right to transact the business of indemnifying employers and others in the state of Ohio.

Certain parties intervened claiming to be creditors of Mark P. Wells, a contractor under the United States Government for the construction, extension, remodelling and repair of a post office building at Lima, Ohio, and that said the Empire State Surety Company had become surety for said Mark P. Wells upon a bond given to the United States Government in pursuance to an act of Congress approved February 24, 1905, which said bond, was among other things, conditioned that said Mark P. Wells should promptly make all payments to persons supplying him with labor and material in the prosecution of the work contemplated in said contract.

Some of the intervening creditors, among whom was Grainger & Company, reduced their claims to judgment in an action in the United States District Court, Western Division, in the Northern District of Ohio.

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To the intervening cross-petitions Frank Hasbrouck, superintendent of insurance of the state of New York, and Frederic G. Dunham, special deputy superintendent of insurance of the state of New York, filed a joint answer claiming the right to receive and administer the said fund of \$50,000.

Grainger & Company demurred separately to each paragraph and defense of the joint answer of said Hasbrouck and Dunham.

This demurrer was sustained by the lower court. Final judgment was rendered and thereupon the case was appealed to this court.

We have carefully considered the authorities cited in the very exhaustive briefs which have been filed by counsel.

We shall not attempt to discuss or distinguish in detail the authorities so cited, but will merely announce the conclusion at which we have arrived after a careful study of such authorities.

The federal statute referred to by counsel extends the liability of the surety upon a contractor's bond to the payment of the claims of the creditors of the contractor for labor and material furnished under the principal contract. In view of the federal statute and the liability thereby created, such creditors of the principal contractor would become policy holders within the purview of Section 9510, General Code.

It is evident, however, that the deposit provided for in Section 9510, General Code, was intended to be held for the benefit of the policy holders whose rights grow out of contracts made and business transacted within the state of Ohio.

It is true the contract between Wells and the United States Government for the improvement of the post office building at Lima and the contract of the Empire Surety Company guaranteeing the performance thereof were, according to the averments of the said answer, executed outside the state of Ohio.

These contracts were, however, to be performed within the state of Ohio, and the parties contemplated that the contracts for labor and material would be performed within the state of Ohio.

The federal act extending liability of the surety, upon the contractor's bond, to the creditors of the principal contractor for material and labor under the principal contract fixes the

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jurisdiction over the enforcement of the rights of the creditors of the place where the contract is to be performed.

The fact that the United States Government has control over the post office site in question by cession from the state of Ohio does not supercede the jurisdiction of the state over the business involved in the performance of the contracts for labor and material.

Under this situation, we think the contract of Wells with the Empire State Surety Company should be regarded as the transaction of business in Ohio, and that the creditors of Wells growing out of the performance of the contract in question are entitled to the benefit of the deposit made by the Empire State Surety Company under the provisions of Sections 9510 and 641, General Code.

We have carefully considered all of the questions discussed by counsel for the insurance department of the state of New York in their brief, but are of opinion that the demurrer to the answer of Hasbrouck and Dunham should be sustained.

Demurrer sustained.

FERNEDING, J., and ALLREAD, J., concur.

NATURE OF TITLE PASSED BY A WILL.

Before Judges Chittenden, Kinkead and Richards, of the Sixth District,
sitting in place of the Judges of the Fifth District.

Court of Appeals for Knox County.

ROBERT S. HULL V. GEORGE WILLIAM CHISHOLM, AND THE SUN
LUMBER COMPANY V. GEORGE WILLIAM CHISHOLM.

Decided, April 14, 1917.

*Title—Determination of, by Construction of a Will—Title in Fee Simple
Passes—Under a Devise With Absolute Power of Disposal—Limit-
ation Over Inconsistent and Without Effect.*

Where by the terms of a will a fee is clearly given, a limitation over
of the remainder is void as inconsistent with the fee granted.

*Edward Kibler, F. O. Levering and Greer & Cromley, for
plaintiffs in error.*

A. A. Stasel, J. B. Graham and W. A. Hosack, contra.

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CHITTENDEN, J.

Error to the court of common pleas.

The same question is involved in these two actions. They were argued together and will be disposed of together.

The actions are brought to recover possession of specific real estate, the title to which is determined by a construction of the will of Sarah Hutchinson. Sarah Hutchinson died on October 23, 1895, leaving a last will and testament which was duly probated. The will reads as follows:

"In the name of the benevolent father of all:—

"I, Sarah Hutchinson, of the city of Mount Vernon, Ohio, do make and publish this my last will and testament, viz.:

"Item 1st. I will that all my just debts and funeral expenses be first fully paid; and if I have not erected a monument for my late husband and myself I direct that such monument be erected at a cost not to exceed the sum of two hundred and fifty dollars.

"Item 2d. I will and bequeath to Alice V. Hutchinson of the City of Mount Vernon all the property of which I may die seized or possessed, both real and personal, to her and her heirs and assigns forever, subject to payment of the debts, expenses and cost of monument mentioned in Item 1 above.

"Item 3d. I will and direct that in case of the death of the said Alice V. Hutchinson without leaving any child or children that whatever may remain of the property willed to her in the 2d item of this will shall be equally divided between my nephews George B. Stahl of Mount Vernon, Ohio, and Oscar S. Blaney of Marshalltown, Iowa, and in case of the death of the said Oscar S. before the said Alice V. Hutchinson then the share of said Oscar S. in said residue shall go to the said George B. Stahl.

"In witness whereof I have hereunto set my hand and seal this 22d day of July, A. D. 1882.

"SARAH HUTCHINSON.

"Signed, sealed and acknowledged by the said Sarah Hutchinson as her last will and testament in our presence and signed by us in her presence and in the presence of each other and at her request.

"WM. MCCLELLAND,

"W. C. CULBERTSON."

Alice V. Hutchinson was the daughter of a servant of Mr. and Mrs. Hutchinson and lived with them from the time of

her birth. She took the name of Hutchinson and was never known by any other name until her marriage. After the death of Sarah Hutchinson, Alice V. Hutchinson was in possession of the real estate in question until the 6th day of June, 1904, when she sold and conveyed the property to one Banner Allen, from whom the title passed through other parties to the defendants in these actions. Alice V. Hutchinson had no child or children, and died on the 15th day of April, 1915, without leaving any property of any kind or nature.

It is the contention of the plaintiff that Alice V. Hutchinson took only a life estate in the property that remained after the payment of the debts and funeral expenses of Sarah Hutchinson and the erection of the monument provided for by the will.

The defendants contend that Alice V. Hutchinson took a title in fee simple and that the devise of what remained of the property at the death of Alice V. Hutchinson, to the nephews of Sarah Hutchinson, is void.

The case has been skillfully argued both orally and by brief. The questions involved are so manifestly controlled by judicial decisions in this state that we think it unnecessary to discuss the cases and the opinions cited, in an opinion in this case.

We hold that Alice V. Hutchinson took a title in fee simple and that the defendants hold the property by a valid title, upon authority of *The Widows' Home v. Lippardt*, 70 O. S., 261; *Cora Blee Tracy et al v. Miranda Blee et al*, 22 C.C.(N. S.), 33; and *Steuer v. Steuer*, 8 C.C.(N.S.), 71. We also call attention to the statement of the law as found in 40 Cyc., 1587.

The judgment of the court of common pleas in each case will be reversed; and, inasmuch as the title to the property depends upon the construction of the will, and a remanding of the case for new trial could result in nothing other than a decree in favor of the defendants, this court will proceed to enter the decree that should have been entered by the common pleas court, dismissing the petition of the plaintiff in each case, at his costs, and quieting the title of the defendants in the property in question.

KINKADE, J., and RICHARDS, J., concur.

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Mahoning County.

**LIABILITY OF COUNTY FOR DEATH OF ONE KILLED
BY A MOB.**

Court of Appeals for Mahoning County.

IRENE DAVIS, AS ADMINISTRATRIX OF ROBERT DAVIS, DE-
CEASED, V. THE BOARD OF COMMISSIONERS OF MA-
HONING COUNTY, OHIO, ET AL.

Decided, September 28, 1917.

*Mobs—Statutory Remedy for Violence—County Not Liable, When—
Section 6283, General Code, Construed.*

In an action to recover damages against a county under favor of Section 6283, General Code, for the death or injury of a person by a mob, it must appear from the evidence that death or the injury was inflicted by the mob while attempting to lynch another person, and such person must at the time be the definite object of the mob's violence. The phrase "another person" can not be construed to mean "no one in particular" but a person certain and definite.

Franklin B. Powers, for plaintiff in error.

J. P. Huxley, Prosecuting Attorney, and *H. H. Hull*, Assistant Prosecuting Attorney, contra.

FARR, J.

This is an error proceeding prosecuted in this court to reverse a judgment of the court of common pleas of this county. The parties sustain the same relation here which they sustained in the court below.

On the 18th day of January, A. D. 1916, the plaintiff in error began an action in the lower court seeking to recover against the county of Mahoning for the death of her decedent on or about the 7th day of January in said year, A. D. 1916, which it is claimed resulted from a bullet wound or injury received on said date, while decedent was in the employ of the Pittsburg & Lake Erie Railroad Company, and while walking along its tracks adjacent to Broad street in the municipality of East Youngstown, this county.

The petition among other things avers that at and immediately prior to the hour of midnight on said date there was a collection of people upon and near to said Broad street, in and near to the business district of said village, assembled for an unlawful purpose and intending to do damage and serious injury to divers persons and pretending to exercise correctional power over divers persons by violence and without authority of law, and that said assemblage of people were intending to and did cause damages to buildings and the contents thereof, within the business district of said village and to do violence to the owners of said buildings, also to the police officers and divers good citizens of said village and to do or cause damage to the buildings, properties and bridge of the Youngstown Sheet & Tube Company, and to exercise correctional power over the servants, agents and employees of said company, and were acting with reckless and lawless disregard for the safety and lawful rights of any and all persons; that her decedent while about the performance of his duties as a car repairer and while walking along the tracks of said railroad company, adjacent to said Broad street as aforesaid, suffered a bullet wound by the act or acts of such collection of persons, acting as aforesaid, from which he soon thereafter died, and by reason of which plaintiff claims damages against said county of Mahoning in the sum of five thousand dollars.

To said petition an answer was filed, admitting the immaterial allegations thereof and denying each and every other averment, and charging that decedent's death was brought about as the direct and proximate result of his own willful, negligent and criminal conduct, and that decedent took an active part in the criminal and riotous conduct of said collection or assemblage of people and that while so engaged he was shot and his life thereby taken, and if not so taken, that it was taken at the hands of those who were lawfully attempting to quell said riot and to bring the persons so collected for riotous and criminal purposes to order and justice.

Trial was had in the court below, in which a verdict was directed for defendants, upon which judgment was entered and

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from which error is prosecuted in this court. The action below was brought under favor of Sections 6278 to 6289, General Code, inclusive.

The record discloses that in the evening of said 7th day of January, A. D. 1916, a collection of people had assembled in said Broad street of said village of East Youngstown and were rioting by looting and burning buildings and discharging firearms promiscuously; there was also rioting and lawlessness in other parts of said village which continued at intervals throughout the night. At about midnight an armed party of some fifteen persons approached Broad street from a westerly direction and they were also discharging firearms somewhat promiscuously. At or near that time the fire by the rioters or mob at Broad street became more rapid, then lessened somewhat. It was about this time that said decedent Davis was walking along said railroad tracks adjacent to said Broad street. Three persons, Mike Cushner, Joseph Danko and Joseph Cramer, were likewise walking along said tracks and about ten feet behind Davis when he suddenly fell to the ground, and when they approached and raised him up he said that he was shot. They then placed him aboard an engine which conveyed him to the hospital where he later died. The record does not disclose who fired said shot nor from what direction it came; nor does it disclose that at the time the wound was received that said mob or party approaching from the west and who were also discharging firearms had any particular person or persons in view or as the object of their lawlessness. The record does disclose, however, by the testimony of Mr. Voltz, that near five o'clock in the evening rioters were shooting at the bridge of said Youngstown Sheet & Tube Company and that men employed by said company were on said bridge at the time. This is practically the only testimony as to any definite object of the mob's violence.

It is urged, however, that liability attached as against said county by provision of the above sections, 6278 to 6289, General Code, and especially Section 6281, which provides that a person assaulted and lynched by a mob may recover from the county in which such assault is made, etc., and it is conceded that the

action below rests largely within the authority vouchsafed by Section 6283, which reads as follows:

“Sec. 6283. A person suffering death or injury from a mob attempting to lynch another person shall come within the provisions of this chapter. He or his legal representatives shall have a like right of action as one purposely injured or killed by such mob.”

And it is further urged that in construing the above section it is necessary to read in connection therewith Section 6278, General Code, which provides as follows:

“Sec. 6278. A collection of people assembled for an unlawful purpose and intending to do damage or injury to any one, or pretending to exercise correctional power over other persons by violence and without authority of law, shall be deemed a ‘mob’ for the purpose of this chapter. An act of violence by a mob upon the body of any person shall constitute a ‘lynching’ within the meaning of this chapter.”

The issue raised here is, therefore, can recovery be had against the county for the death of Davis by virtue of the foregoing sections, when at the moment the fatal wound was received the firing by the mob at Broad street, as well as by the party approaching from a westerly direction, was desultory and without any definite aim or object, so far as the record discloses, and in the absence of any positive testimony as to the course of the shot or the direction from whence it came? Two words are defined in the above Section 6278, namely, “mob” and “lynching,” and it was evidently not the legislative intent to permit the common law definitions to control. There is, therefore, no question in the instant case but that a “mob” had assembled; but was there a “lynching,” was Davis lynched? That is the real issue here. Lynching is defined in said Section 6278 as follows: “An act of violence by a mob upon the body of any person shall constitute a ‘lynching’ within the meaning of this chapter.”

Three things are, therefore, necessary to constitute such lynching, a mob, a person, and an act of violence upon the body of

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that person by such mob, and whenever the act of violence is visited upon the body of any person, then it must be said that such mob has a definite fixed purpose as to such person; that is, it purposes to do the violent act and the person upon whom it is visited is the objective of the act. Such is clearly the legislative intent and as further indicated in Section 6283 as follows:

“A person suffering death or injury from a mob attempting to lynch another person shall come within the provisions of this chapter.”

An “attempt” is the effort or endeavor to carry into execution a previously conceived plan or purpose; therefore the phrase “another person” can not mean “no one in particular,” or “everybody in general,” but must be the subject of the plan, the object of the purpose, and such was the legislative intent. Said act, though liberal in its terms, was never intended to provide compensation for the indiscriminate, lawless, predatory acts of a riotous mob generally but not definitely on mischief bent, but to provide a remedy for damages suffered from definite, specific acts, and such is the reasonable import of the language used and easily deducible therefrom; and it is the ordinary and reasonable meaning which must control in its construction. *Conrad v. Davies, Aud.*, 14 C.C.(N.S.), 477; *Dorgan v. Columbus et al*, 12 Dec., 128; *Gas & Water Company v. Elyria*, 57 O. S., 383.

Attention is called to the case of *Caldwell v. Commissioners of Cuyahoga County*, 62 O. S., 318, which it is urged is helpful in the instant case, but which is found not well in point, as it determines principally a constitutional question. A very well considered case, however, and one regarded as worthy of notice here is that of *Gray v. Gibson et al*, 12 N.P.(N.S.), 673, the first section of the syllabus of which reads as follows:

“The statutory provision for recovery of damages by persons who have suffered at the hands of a mob is limited to injuries, whether fatal or otherwise, suffered from a mob attempting to lynch another, and does not embrace injuries resulting from violence by a mob having no intent or purpose to lynch.”

The foregoing is well in point and involves the construction of some of the sections of the General Code involved here.

In the case at bar there is no definite proof of the source from which the fatal shot came, or that at the time Davis fell mortally wounded the mob had any object or aim except to burn, pillage and shoot aimlessly in its drunken frenzy, and for this reason the plaintiff failed to maintain the action.

Therefore, in view of all the foregoing it must be held that the court below properly arrested the case from the consideration of the jury, and the judgment is affirmed.

POLLOCK, J., and METCALFE, J., concur.

**DAMAGES FOR MISTAKE IN THE TRANSMISSION
OF A MESSAGE.**

Court of Appeals for Allen County.

The Judges of the Sixth District sitting in place of the Judges
of the Third District.

THE POSTAL TELEGRAPH-CABLE COMPANY v. J. A. JONES.

Decided, March 16, 1917.

Telegraph and Telephone—Validity of Limitation of Amount of Recovery for Mistake in Transmission of a Message—Rule of the Federal Courts, Excluding Liability Except for Gross Negligence—Controls Where the Business Was Interstate.

1. The validity of a limitation on the amount of recovery for mistake in the transmission of an interstate telegraphic message is to be determined by the federal law, and by that law a printed provision on the back of the blank, known to the sender, limiting the amount of recovery for mistake in the transmission of an unreported night lettergram to the amount received for sending the same, is reasonable and valid, and the company is not liable beyond such amount in the absence of willful misconduct or gross negligence.
2. Evidence which shows a mere mistake in transmitting a message quoting the price of onions, whereby the word "one" is substituted for the word "two" does not show willful misconduct or gross negligence.

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Mackenzie & Weadock, for plaintiff in error.
Hughes & Tripplehorn, contra.

RICHARDS, J.

Error to the court of common pleas.

Suit was brought in the court of common pleas by Jones to recover damages of the Postal Telegraph-Cable Company in the amount of \$240, arising from an error in the transmission of a telegraphic night letter message. The trial resulted in a verdict and judgment in the sum of \$75, and to reverse this judgment this proceeding in error is brought.

Jones was dealing in onions at McGuffey, Ohio, and desired to quote a price on same to Weinberg Brothers at Galesburg, Illinois, and in order to accomplish this purpose he telephoned the operator of the defendant company at Lima and dictated to him the message that he wished to have sent. That message as dictated over the telephone reads as follows:

“MCGUFFEY, OHIO, 8-31-13.

“WEINBERG BROS.,

“Galesburg, Ills.

“Offer car white onions two twenty-five cwt. sea grass bags delivered quick shipment subject prior sale.

“J. A. JONES.”

The message as delivered to Weinberg Brothers in Galesburg, Illinois, stated the price at one twenty-five per hundredweight instead of two twenty-five per hundredweight as stated in the original message.

The message was accepted at the office of the defendant company in Lima at night as a night lettergram and was not repeated nor was it asked to be repeated. The blank on which it was written by the operator at Lima contains a request that the same should be sent as a night lettergram without repeating, and subject to the conditions printed on the back which are stated to be agreed to. On the back of the blank among other conditions is found the following:

“1. The company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any unre-

peated night lettergram beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any repeated night lettergram beyond fifty times the sum received for sending the same, unless specially valued and insured."

The plaintiff testified on the trial of the case that he expected this message to be sent as a night lettergram on the regular blank used for that purpose by the company, and that he was familiar with the methods of doing that business as he had been a frequent patron of the company and had himself been a telegraph operator for the period of seventeen years. He must, under these circumstances, be held to have had full knowledge of the terms and conditions contained on the blanks used by the company for the transmission of night lettergrams and to have assented thereto.

Contention, however, is made by counsel for Mr. Jones that this condition is invalid, and the principal question is whether that is to be determined by the state or by the federal law. Of course, if the terms and conditions are valid and binding, the amount of recovery could be only the sum paid for the transmission of the message, which was fifty cents. In furtherance of the enforcement of that limitation counsel for the company asked the trial judge to charge the jury before argument the following proposition:

"Gentlemen of the jury, if you find from the evidence that J. A. Jones sent defendant's Exhibit 'J' to Weinberg Brothers from Lima, Ohio, to Galesburg, Illinois, or caused the same to be signed for him and sent for him, I charge you as a matter of the law that the defendant is not liable for mistakes or delays in the transmission or delivery, or for non-delivery of any un-repeated night lettergram beyond the amount received by defendant for sending the same."

The court refused to give this instruction to the jury.

Section 1 of the Interstate Commerce Act, as amended June 18, 1910, provides that the act shall apply to telegraph, telephone and cable companies (whether wire or wireless), engaged in sending messages from one state, territory or district of the

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United States to any other state, territory or district of the United States or to any foreign country. This act further provides for reasonable charges for such services and authorizes classification of such messages. We have no doubt that Congress by enacting this statute has asserted complete control over the transmission and delivery of interstate messages, and Congress having so occupied this field brought the interstate business of such companies within the jurisdiction of the federal courts and left no room for the control of that business by the separate states. The entire field of the business of interstate messages is brought fully within the control of the federal law and is to be determined thereby as much as the liability of a railroad when one of its employees is injured, where the company and the employee are both engaged in interstate commerce in transacting the business in which the employee is injured. In determining, therefore, whether the limitation of liability contained on the form of night lettergram used by the company is valid we must look to the holdings of the federal courts on that subject.

The matter was fully considered by the Supreme Court of the United States in *Primrose v. Western Union Telegraph Co.*, 154 U. S., 1, where a stipulation contained on the message, that the company should not be liable for mistakes in the transmission or delivery of the message, beyond the sum received for sending it, unless the sender should order the message to be repeated and pay half that sum in addition, was held to be reasonable and valid. It is true that the message which was transmitted in that case was written in cipher and that the company was not advised of the import thereof, and some stress is laid on this fact in the course of the opinion. But it is also true that the opinion of the court delivered by Mr. Justice Gray relies very largely on cases where the messages transmitted were not in cipher and where the courts had reached in such case a conclusion that the limitation was valid.

The case was cited with approval in *Western Union Telegraph Co. v. James*, 162 U. S., 663. It is also cited in *Box v. Postal Telegraph-Cable Co.*, 91 C. C. A., 174; and in this latter case

the circuit court of appeals states that the Primrose case settles the validity and binding effect of the rule in question and is an answer to all authorities which hold that the limitation is void as against public policy.

Among the authorities relief upon by the Supreme Court of the United States in the Primrose case cited *supra*, are decisions of the Court of Appeals of New York. Since that decision the New York courts have had the question before them in various forms, one of the latest cases being *Weld et al v. Postal Telegraph-Cable Company*, 199 N. Y., 88, in which the court say that the trial court properly charged the jury that the conditions printed on the blank or form upon which the message was sent were binding upon the plaintiffs and absolved the defendant from liability for damages unless they were occasioned by the defendant's gross negligence.

Following, therefore, the holdings of the federal courts and the state authorities approved by the federal courts, we reach the conclusion that the limitation of liability contained on the printed form of the night letter used in transmitting the message is valid and binding, and that the extent of liability therefore is the amount paid for the transmission of the message. The trial court should have given to the jury in charge the instruction which was requested.

The rule of the federal courts excludes liability except in cases of gross negligence or willful misconduct on the part of the company. The only error in transmitting the message was in substituting the word "one" for the word "two," and that alone does not tend to show either gross negligence or willful misconduct upon the part of the company. See *Halstead et al v. Postal Telegraph-Cable Co.*, 193 N. Y., 293, 19 L. R. A. (N. S.), 1021; *Wheelock v. Postal Telegraph-Cable Co.*, 197 Mass., 119.

That the authorities are utterly irreconcilable is clearly shown in 37 Cyc., 1684, where they are collected. This condition of the authorities makes it absolutely necessary in deciding a case of this character to determine whether the same is controlled by the federal or state authorities. The message being an interstate one is clearly controlled by the federal law.

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It follows that the judgment for seventy-five dollars rendered in favor of the plaintiff below should be modified; and it is the order of the court that the same be modified by reducing it to fifty cents, and as so modified it will be affirmed; each party to pay his own costs.

CHITTENDEN, J., and KINKADE, J., concur.

**SUFFICIENCY OF PROCEEDINGS ESTABLISHING "DRY"
TERRITORY IN A RESIDENCE DISTRICT.**

Court of Appeals for Fairfield County.

**WILLIAM RIDER, JR., v. H. F. REPASS, MAYOR OF
THE CITY OF LANCASTER.***

Decided, October 31, 1917.

Intoxicating Liquors—Proceedings Making Territory "Dry" Under the Jones Local Option Law—Requirement as to Attaching Maps to Petitions—Including of Small Strip Outside of Corporation Treated as a Mistake—Exempted Blocks—Registered Voters Are Qualified Signers of Petitions—Sections 6067-8-9.

1. The provisions of the local option law, that maps shall be attached to petitions for establishment of a district in which the sale of intoxicating liquor is prohibited, has been complied with where a second blank form was attached for additional names, instead of placing them on a blank piece of paper and attaching that to the petition, no showing having been made of fraud or that any resident of the proposed district was misled thereby.
2. The requirement that the territory included in such a district be within the corporate limits is not satisfied, where a railway track is made one of the boundary lines and a strip of land forty feet in width, forming part of the railway right-of-way and lying between the track and the municipal boundary line, is thus included in the proposed district; but the inclusion of such a strip may be treated by a court as a mistake and the description ordered modified by striking out the territory thus wrongly embraced in the district as described in the petition.

*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, January 22, 1918.

3. A showing that those signing the petition are registered electors sufficiently establishes their qualification in that behalf.

C. W. McCleery, for plaintiff in error.

J. A. White, J. W. Deffenbaugh and Ben R. Dolson, contra.

HOUCK, J.

The proceeding before us for review is one in error in which it is sought to reverse a judgment entered by Hon. John G. Reeves, Judge of the Common Pleas Court of Fairfield County, Ohio, in which the court on a petition filed under favor of what is known as the "Jones residence local option law," ordered and directed that the prayer of the petitioners be granted, prohibiting the sale of intoxicating liquors as a beverage in the residence district described in said petition, in the city of Lancaster, Ohio.

The errors relied upon by counsel for plaintiff in error are: first, that maps were not attached to the petitions, as required by law; second, that there is a defect in the description of the territory sought to be made dry, because it includes a strip of land about forty feet wide and eleven hundred feet in length on the southern boundary line of the proposed dry district or territory that is without the corporate limits of the city of Lancaster; third, that the district contains an exempted business block; fourth, that the required number of qualified electors did not sign the petitions.

Counsel for plaintiff in error urges that there were nine petitions, executed in the usual form, and but five maps, and therefore Section 6146 of the General Code was not complied with. Said section reads:

"All petitions for signatures, under the next six preceding sections, shall have a map or drawing attached, showing the outlines of the district, and location of all saloons within the district proposed."

Upon an examination of the petitions and maps, we find that all of the petitions are in the usual printed form, and that four of the maps have attached to them two petitions each, and

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one of the maps has one petition. All are securely fastened by hooks or fasteners.

No complaint is made as to the one petition and one map, but it is insisted upon that because one map in four instances is attached to two petitions, such is not a compliance with the above statute. The same names do not appear on the second blank form of petition as on the first, and we do not see how any one could be prejudiced by this because for convenience a second blank form petition was used instead of inserting a blank piece of paper for signatures. The second blank form was no doubt used for convenience, and in the absence of a showing of fraud, or that any qualified elector or resident of the district was misled thereby, or in some way prejudiced, we do not think that the plaintiff in error has any just cause of complaint in this regard.

Plaintiff in error insists that the petitions and maps upon their face show that there is an entire failure to properly and legally describe a municipal district. It is claimed that the description includes a part of Berne township, without the corporate limits of Lancaster; that the south boundary line of the district is the north line of the C., A. & C. Railway, which includes a strip of land eleven hundred feet in length and forty feet in width, outside of the south boundary line of the corporation limits of the city of Lancaster. Section 6068, General Code, reads:

“The phrase, ‘residence district,’ as used in this chapter, and in the penal statutes of this state, means a clearly described, contiguous compact section or territory in a municipal corporation, bounded by street, corporation, or other well recognized lines or boundaries, and containing not less than three hundred qualified electors, nor more than five thousand qualified electors.”

An examination of the language used in the above statute can lead us to but one termination, and that is that a “residence district” must be clearly described, and that the territory therein must be a compact section or part of a municipal corpora-

tion, etc. The territory can not legally embrace any territory outside of the corporate limits.

The territory in dispute is conceded to be the right-of-way of the C., A. & C. Railway Company; that no one lives upon it; that no one residing therein signed the petitions, or either of them, and no one having any interest in said disputed territory is claiming to be prejudiced by this proceeding.

How could any one be prejudiced thereby, whether he lived within the boundaries of the parcel of land in question or in the corporate limits of Lancaster?

The only power and authority given to the residents of a municipality under the Jones law for local option residence districts is contained in Section 6140, General Code. This statute applies to municipalities alone, and no jurisdiction is given them outside of such municipal corporations.

How can it with any force be urged that when the petitions and maps now under consideration were drawn that it was intended that the disputed territory should be included? To us it seems clear that it was included by mistake, because an examination of the Jones law plainly indicates that no territory can be legally included outside of the municipality. We hold the rule to be, as applied to the facts in this case, where outside territory is included, that all such territory so included in the description of the district lying outside of the corporate limits of the city of Lancaster, Ohio, should be excluded, but that fact does not within itself invalidate the district lying and being within the corporate limits.

Then let us inquire, who can be prejudiced if the territory which has been included by mistake, and over which the municipality of Lancaster has no jurisdiction, is excluded? We are of the opinion that no one will suffer injury or prejudice thereby, and that the purpose and intent of all parties in interest will be fully carried out, and, further, that the legislative intent of the provisions of Section 6068 will in no wise be violated. We believe that any other or different application of the provisions of this statute to the conceded facts in this case would be a strained one, and entirely out of tune with the well known rule

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as applied to the construction of and application of statutory law.

Coming now to the next ground of alleged error: does the district contain an exempted block? An examination of the bill of exceptions discloses that the block in question is a vacant tract of land, and if it is used for any purpose at this time it is for farming, which fact was conceded by counsel for plaintiff in error in oral argument. With this fact before us, we are inclined to believe that it will not now be urged that this alleged error is well taken.

The fourth and last error relied upon is as to whether or not the required number of qualified electors signed said petitions, and whether or not the evidence offered establishes the fact that they were qualified as required by Section 6067, General Code.

Learned counsel for the plaintiff in error maintains that "proving a petitioner was registered in a certain precinct does not show that he is a citizen or entitled to vote. If it did, all that a man would have to do would be to get registered, and thereby prove his qualification or right to vote. The adjective 'registered' does not take away any of the qualifications necessary to be shown to prove that he is a voter; it only adds another and further requisite to be proven; he must still be a voter, whether registered or not, and this can not be done without showing that he is a citizen of the United States, in addition to the other qualifications mentioned." We are not in accord with this claim of counsel, and can not and do not subscribe to it, because it is too narrow a construction placed upon Section 6067, General Code.

The Legislature, in enacting this section, saw fit to define therein "qualified elector," and in order to make it clear, definite and certain as to meaning, and make a definition for the phrase "qualified elector," as used in said statute with reference to petitions in a residence district of a municipal corporation, defines the same to be, "a registered male voter in a municipal corporation which has registration, or a male voter entitled to register therein, or a male voter of a municipal corporation which does not have registration, provided that in each case

such qualified elector has been a *bona fide* resident of such residence district for four months before the filing of the petition upon which his name appears."

It is therefore apparent that in the enactment of this statute the Legislature has settled some things which might otherwise be difficult of proof. This section clearly and specifically defines who is a qualified elector. The statute is in no wise ambiguous. It was the purpose and intent of the Legislature to so define "qualified elector," which it did by language clear, plain and definite, and which needs no interpretation.

The record in this case shows that more than the requisite number of petitioners was obtained, and that they were qualified electors of the district, as required by law.

It is not our purpose or intention to discuss the questions involved in this case at further length, except to say that it is not within the domain, nor is it the duty of a reviewing court to reverse a judgment of a lower court for mere technical reasons, but a reversal must be based upon errors which are apparent upon an examination of the record and found to be clearly prejudicial to the right or rights of those complaining; and after a careful examination of the evidence in this case, as presented in the bill of exceptions, and from the entire record before us a majority of the court holds that there are not such errors in the record affecting the substantial rights of the plaintiff in error as would warrant a reviewing court in reversing the judgment of the common pleas court in this case. But we do find, however, on the conceded facts in the case as disclosed by the record, that the judgment entered below should be modified by striking out of or amending the description of the territory described in the petitions, by excluding therefrom all that part of the territory included therein lying and being outside of the corporate limits of the city of Lancaster.

Judgment affirmed as modified.

POWELL, J., concurs; SHIELDS, J., dissents.

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**LIMITED CHARACTER OF THE FORD MOTOR
COMPANY AGENCIES.**

Court of Appeals for Adams County.

W. H. OREBAUGH v. W. C. NEU.

Decided, January 24, 1917.

Agency—Character of the Contracts—Between the Ford Motor Company and Its Agents—Title Passes Directly from the Company to the Purchaser—Validity of the Contract—Damages for Violation of Its Terms by One Acting with Knowledge.

The Ford Motor Company, in its limited agency contract, withholds the title to the machine in itself and the agent has the right only to solicit purchasers and no right to give complete title to the purchaser except by bill of sale signed by the Ford Motor Company, and its sales are made through its own agents under the contract, and it is protected in so directly selling by its patents, and its contract is not monopolistic, in restraint of trade, or in violation of the Sherman anti-trust law, or against public policy.

The plaintiff in error filed his amended petition in the court of common pleas, alleging that on the 3d day of October, 1913, and for a long time prior thereto, the Ford Motor Company, a corporation duly incorporated under the laws of the state of Michigan and having its place of business in the city of Detroit, in the state of Michigan, was engaged in the manufacture and sale of a certain line of automobiles and automobile accessories, known as Ford automobile, of which it was the sole manufacturer; that they were manufactured under letters patent of the United States, of which the Ford Motor Company was the sole and exclusive owner. On said 3d day of October, 1913, the plaintiff made application to the said Ford Motor Company to be its agent in the following territory, viz., Winchester, Ohio, and Adams county, all in the state of Ohio, and said Ford Motor Company accepted said application and entered into a written contract. Then follows a copy of the contract.

On the 9th day of March, 1914, the plaintiff and defendant, having full notice and knowledge of the existence, terms, provi-

sions and conditions of said contract of plaintiff with said Ford Motor Company, entered into a partnership in the business of selling automobiles. Said partnership took over and assumed all the rights, powers and privileges contained in said contract between plaintiff and said Ford Motor Company, and prior to said 9th day of March, 1914, plaintiff and defendant, as such partners, ordered and requested a consignment to plaintiff from said Ford Motor Company under said contract between plaintiff and said Ford Motor Company of a large number of said Ford automobiles, to be sold under the provisions of said contract. That plaintiff and defendant, as such partners, advanced to said Ford Motor Company eighty-five per cent. of the full advertised list price of the consignment. That said cars so ordered were duly shipped by the Ford Motor Company.

On the 9th day of March, 1914, while plaintiff and defendant, as such partners, had in their possession a large number of such cars belonging to said Ford Motor Company, they dissolved said partnership and entered into a contract of dissolution. Part of said contract is as follows:

“* * * W. C. Neu is to have as his share in the division of the property eleven new motor cars in good condition; Orebaugh is to have all the balance of the machines, * * *”

Also the following:

“The said W. C. Neu is to sell all his cars in accordance with the terms of the contract between the Ford Motor Company and W. H. Orebaugh and the said W. H. Orebaugh agrees to sell on the same conditions, and neither of them is to interfere with the other's sales.”

Plaintiff says that the defendant, in violation of said written agreement of defendant with plaintiff, and with full knowledge of said contract between plaintiff and the Ford Motor Company; between the 9th day of March, 1914, and the 30th day of September, 1914, and while both contracts were in full force and effect, which defendant well knew, sold a large number of said Ford motor cars so received by defendant under his written agreement with plaintiff, to-wit: six of said new Ford motor

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cars, outside of the specified territory mentioned in said contract of limited agency between this plaintiff and the said Ford Motor Company, by knowingly selling the same to persons who are, and then were, residents of Scioto county, Ohio. Thereupon said Ford Motor Company, through one W. J. Friel, its limited agent in said Scioto county, Ohio, called upon the plaintiff, and plaintiff under his said contract with the said Ford Motor Company was compelled to, and did, pay at the order of the Ford Motor Company to its limited agent at Portsmouth, Ohio, the sum of \$400 damages by reason of such sale so made by defendant in violation of said contract between plaintiff and defendant.

Wherefore, plaintiff claims a judgment against the defendant for the sum of \$400.

To this amended petition the defendant filed a general demurrer on the ground of insufficiency.

Blair & Kimble, for plaintiff in error.

Joseph W. Bagby and *C. E. Roebuck*, contra.

WALTERS, J.

The question raised is, whether or not the contract between Orebaugh and the Ford Motor Company is against public policy, monopolistic in its tendencies, and in violation of the Sherman anti-trust law.

The former contract of the Ford Motor Company was under consideration and an opinion rendered by Judge Hollister, of the District Court of the United States for the Southern District of Ohio, Western Division, in cause No. 2174, *Ford Motor Company v. The Union Motor Sales Company et al*, and Judge Hollister held in the opinion in that case that the contract of the Ford Motor Company then existing and under consideration by the court was monopolistic, against public policy, and came within the provisions of the Sherman anti-trust law.

Whether or not the contract now under consideration (or the contract under consideration by Judge Hollister) is a contract which the Ford Motor Company had no right to make with its agents depends upon whether or not the contract provides

for the sale of the machines to the agents—whether or not the title to the machines vest in the agent.

After the said decision the attorneys for the Ford Motor Company drew up another contract, which they attempted to take out of the provisions of the decision of Judge Hollister. As to whether or not they have done so, is the principal question in this case.

Judge Hollister held that a patentee, when he sold his machines to a vendee and received the full purchase price therefor as such patentee and manufacturer, could not dictate the price at which his agent or vendee should sell the article. That under the patent laws of the United States when a man received a patent the object is to give him a monopoly and he may manufacture and sell direct for such price as he may fix, and he is protected by the law and his patents, but when he sells to an agent or other person and received the full price he asks for the article and all he expects to receive he can not say to the vendee or agent that he must sell it for a certain price. That is the extent of the protection afforded him by the patent laws of the United States.

Mr. Orebaugh's contract was under the new form of contract provided by the Ford Motor Company, and if its terms withholds the title in the Ford Motor Company, and the agent has the right only to solicit purchasers for the Ford Motor Company, and has no right to give complete title to the purchaser except by bill of sale signed by the Ford Motor Company, it seems to us the Ford Motor Company is selling the machine direct through its agent, and that Orebaugh was simply a soliciting agent for the Ford Motor Company, and that no title passed when Orebaugh secured a purchaser for one of the machines until the Ford Motor Company executed a bill of sale.

Now let us examine some of the provisions of this new contract.

The preamble states:

“Whereas the second party has applied to the first party to be the agent in certain territory hereinafter described, for the sale of said Ford automobiles and parts, and the first party

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is willing to appoint second party, with certain limited authority and upon the following terms and conditions only:"

Condition No. 1 is as follows:

"That first party hereby appoints the second party its 'Limited Agent,' with certain authority as herein expressly stated only, for the purpose of negotiating sales of first party's products to users only in the methods and upon the terms and within the territory herein specifically set forth."

Condition No. 2 is as follows:

"That second party shall have no authority or power or duty whatsoever except as herein expressly conferred."

Condition No. 3 is as follows:

"That first party will consign its Ford automobiles to second party to be sold to users only, and not for re-sale, upon bills of sale to be executed by the first party only, as hereinafter provided."

Condition No. 6 states:

"Second party shall arrange for sales of Ford automobiles."
* * *

And in condition No. 7 we find the term:

"Second party shall arrange all sales." * * *

Condition No. 9 provides:

"The first party may change the list price of any of its products at any time it may choose." * * *

Condition No. 10 sets forth the second party's lien, stating that he shall advance in cash 85% of the full list price of cars at the time of the consignment, and in condition No. 11 the word "consignment" is also used.

Condition No. 13 is as follows:

"First party shall retain all and complete title to each automobile until actual bill of sale, signed and executed by first

party, or one of its factory branch managers, has been delivered to the vendee, who shall be only a user; that is, one who has purchased for immediate use and not for re-sale the Ford automobile, at full advertised list price, plus freight and delivery charges, and without rebate, donation or drawback of any character whatsoever. And any attempt to sell or dispose of or deliver any Ford automobile at less than such price shall be utterly void and shall pass no title whatsoever."

Condition No. 14 specifically gives the second party a lien on each Ford automobile consigned to him for the 85% advanced by him on the sale. The consignee or limited agent could have no lien upon his own property.

Condition No. 15 states:

"* * * second party will make no arrangements for the sale of a Ford automobile without taking such written signed order." * * *

Condition No. 17 states:

"The dealings of the second party with a proposed purchaser of an automobile or the taking of a signed order blank as herein required or a deposit or both, shall not constitute a sale, nor shall first party be bound to accept such order." * * *

Condition No. 19 states:

"Second party shall have no authority to make any warranty whatsoever of Ford automobiles." * * *

Warranty is an incident of ownership.

Condition No. 21 provides:

"In case of damages to automobiles by carriers in transit to second party collection from the carrier shall be made in the name of the first party as the owner of such automobiles."
* * *

In condition No. 23 second party guarantees to save first party harmless from theft and damage of any kind to Ford automobiles while in his possession under consignment.

In condition No. 25 second party agrees to display signs and otherwise advertise as a limited agent for Ford cars, and thus

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establish himself with the public as being simply an intermediate agent between the seller and buyer, or, in other words, a means of communication.

Condition No. 32 is as follows:

"The first party hereby expressly reserves to itself the right to make direct sales to customers in the territory above described, and in such case will pay to the second party five per cent. (5%) of the list price of the automobile or automobiles so sold, after it shall have received the full purchase price in cash. This shall not include sales of parts or accessories, which are otherwise provided for herein." * * *

Condition No. 43 again reserves the right in the first party to change the price of the car at any time, and even after requisitions and deposits are accepted.

All of these provisions, and each and every one of them, are made in this contract with the intent on the part of the contracting parties that the first party shall retain the title and ownership of all automobiles until the limited agent has secured a purchaser, and then not until the first party executes a bill of sale to the purchaser is the sale complete.

The first party reserves the right to make sales in the territory itself: provides that the second party shall not warrant any of the automobiles. If he owned them he could do as he pleased with them. The second party can make all the arrangements for a sale he pleases, but in the contract the Ford Motor Company reserves the right to make the sale by executing a bill of sale. The contract speaks of the second party making arrangements for the sale. Condition No. 13 provides that the Ford Motor Company "shall retain all and complete title to each automobile until actual bill of sale is signed and executed by the first party." * * * Condition No. 9 gives the right to the first party to change the list price of any of the products. That is an index of ownership.

We do not decide whether the relation between the automobile company and the limited agent is that of bailor or bailee. But whatever the relation is, as evidenced by this contract, it may be termed, as it is in the contract, one of limited agency.

We are constrained to believe that what we have quoted of this new contract steers clear of the objections pointed out in the opinion of Judge Hollister in the old contract, and each of the paragraphs quoted from the new contract show distinctly that the Ford Motor Company has simply given the right to its limited agents to procure purchasers; in other words, as is said in the contract, to arrange for the sale, and the company really makes the sale itself after the agent acts as a solicitor in procuring a purchaser. The Ford Motor Company manufactures these automobiles under its different patents issued by the United States, and under this contract it sells them directly through an agent, and that it has a right to do and protected by its patents in fixing whatever price it chooses so long as the title is not vested in the limited agent.

Having concluded this part of the questions that are made in this case and finding that the contract is a valid one, is not against public policy, is not monopolistic, and is not within the provisions of the Sherman anti-trust law, and that the patentee of these articles was discharging only his own legal rights protected by the patents, we now come to the question of the liability of the defendant to plaintiff under the contract of dissolution between them.

It is stated in the amended petition, and the language used in the contract of dissolution is, that Neu had explicit knowledge of all the clauses in the contract of Orebaugh with the Ford Motor Company, and that he agreed in the contract of dissolution he would sell all cars in accordance with the terms of the contract between the Ford Motor Company and W. H. Orebaugh. Now neither Orebaugh nor his partner according to our finding, had any title to any of the cars. Therefore, Orebaugh could confer no title by selling the same to Neu, and in fact it was not a sale—it was a dissolution of the partnership and a division of the assets of the partnership between them upon amicable terms. But Neu, in violation of his contract of dissolution and in violation of the Ford Motor Company contract, of which he knew, as is alleged in the amended petition, sold machines in Scioto county, which he well knew he had no right to

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do, and he knew at the time of his selling of machines outside of the territory limited in the Ford Motor Company contract would make Orebaugh liable for \$250 for each machine so sold. Orebaugh says he has paid the damages to the agent of Scioto county, through the Ford Motor Company, and he now asks the Neu, for a flagrant violation of his contract, pay to him the damages he has sustained thereby. If this was not a fraud on the part of Neu, when he had knowledge of the Ford Motor Company's contract and its provisions against selling outside of certain territory and the penalty attached to Orebaugh for so doing, it certainly nearly amounts to a fraud. For such a violation of the terms of the partnership contract of dissolution and the Ford Motor Company's contract, knowing of the damage that would result to Orebaugh, it seems to us that Orebaugh can maintain an action against Neu.

The judgment of the court below is reversed, cause remanded and the court instructed to overrule the demurrer to the amended petition.

SAYRE, J., and MIDDLETON, J., concur.

**VALIDITY OF THE STATUTE REGULATING PRIVATE
EMPLOYMENT AGENCIES.**

Court of Appeals for Lucas County.

FRANK RAABE V. STATE OF OHIO.

Decided, March 19, 1917.

Constitutional Law—Section 886 et seq., a Proper Exercise of Police Power—Persons Receiving a Fee for Securing Employment Subject to Regulation Under the Act Regulating Private Employment Agencies—Act Not Invalidated by Failure to Provide for Judicial Review—Not Indefinite for Failure to Define the Phrase "Good Moral Character."

1. A person who, claiming to have influence with a business company, furnishes and agrees to furnish to sundry persons employment with said company and for this service receives a fee from the

persons for whom he agreed to furnish employment, and is not acting as agent for a charitable organization, is subject to the provisions of Section 886, General Code, and following sections regulating private employment agencies, even though he maintains no office and displays no sign or bulletin and transacts the business at his residence.

2. Section 886, *et seq.*, of the General Code, providing for the licensing and regulation of private employment agencies, is a constitutional exercise of the police power by the General Assembly.
3. The failure to provide in the act for a review by the courts of a refusal of the commissioner of labor statistics to issue a license on his conclusion that the applicant has violated the law relating to private employment agencies, or is not of good moral character, does not invalidate the statute, since there is a presumption against wanton action by the commissioner, and if there should be such disregard of duty a remedy in the courts would be implied.
4. The failure of the act to define what constitutes "good moral character" or to furnish a standard for determining it, does not render the statute invalid for indefiniteness or uncertainty.

Friedman, Foster & Dixon, for plaintiff in error.

Joseph McGhee, Attorney-General, *J. C. D'Alton*, Prosecuting Attorney, and *W. S. Connors*, contra.

RICHARDS, J.

Error to the court of common pleas.

The plaintiff in error was arrested, tried, convicted and sentenced in the police court of the City of Toledo on a charge that he unlawfully operated and maintained a private employment agency for hire, in violation of the provisions of Section 886, General Code, and succeeding sections. He prosecuted error to the court of common pleas, where the judgment and sentence were affirmed, and he brings this proceeding in error to procure a reversal of these judgments.

It is earnestly contended that the affidavit on which he was arrested is insufficient; that the court erred in the admission of evidence; and that the judgment of conviction is not sustained by sufficient evidence. And it is also insisted that the section of the General Code already cited is in violation of various provisions of the Constitution of Ohio and the Constitution of the United States.

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A careful examination of the affidavit fails to disclose any defect therein. Neither have we found any prejudicial error in the admission or rejection of evidence on the trial of the case.

The act of the General Assembly under which the defendant was prosecuted prohibits any person from operating or maintaining a private employment agency for hire, or in which a fee is charged an applicant for employment, without obtaining a license from the commissioner of labor statistics. The phrase "private employment agency" is clearly defined in Section 893 of the General Code. That section provides in substance that, except an employment agency of a charitable organization, a person furnishing or agreeing to furnish employment or help shall be deemed a private employment agency.

The bill of exceptions contains all of the evidence which was introduced on the trial in the police court and the evidence disclosed therein is of such a character as would justify that court in finding that the defendant, pretending to have influence with a certain company, had on various occasions furnished and agreed to furnish employment to sundry persons with said company, and that for this service he received compensation from the persons for whom he agreed to furnish employment, and that he was not acting as agent of any charitable organization. It is true that the defendant maintained no office and displayed no sign or bulletin indicating that he was operating or maintaining a private employment agency, but various men seeking employment met him at his residence and the business was there ordinarily conducted, and this clearly brings him within the purview of the statute. We are of opinion that the judgment of conviction is not so manifestly against the weight of the evidence contained in the record as to justify a reversal.

The most important question in this case is the claimed unconstitutionality of the act providing for the regulation of private employment agencies. The first section of the act, being Section 886, General Code, prohibits any person, firm or corporation from opening, operating or maintaining a private employment agency for hire, or in which a fee is charged an applicant for employment or an applicant for help, without obtaining

a license from the commissioner of labor statistics. The section also requires the payment of a fee by the applicant for license, which fee is graded according to the population of the municipality in which the licensee is to conduct business, the fee ranging from \$25 in villages to \$100 in cities having a population of fifty thousand or more. The section also provides that the commissioner may refuse to issue or renew a license to an applicant if, in his judgment, such applicant has violated the law relating to private employment agencies or is not of good moral character. The statute does not contain any provision for a review by the courts of the action of the commissioner of labor statistics in refusing to issue or renew a license to an applicant.

It is said that this statute is invalid because it bestows arbitrary power on the commissioner of labor statistics and contains no definitions or directions for the determination of what constitutes good moral character, or what constitutes a violation of the law relating to private employment agencies, by an applicant for a license; that the classification of municipalities in fixing the price of the license is arbitrary and unjustified; and because no provision is made in the statute for a review by the courts of the decisions reached by the commissioner of labor statistics.

We have no doubt that the General Assembly has ample authority to regulate the general subject of employment agencies under the police power possessed by the state. This subject has been many times discussed in the courts and with very few exceptions the conclusion reached has been in favor of the existence of this power in the state Legislatures. I need refer only to the following authorities: *Wessell v. Timberlake*, 95 O. S., 103; *Moore v. City of Minneapolis*, 43 Minn., 418; *Price v. The People of the State of Illinois*, 193 Ill., 114; *The People of the State of New York, ex rel, v. The Warden of the City Prison*, 183 N. Y., 223; *People v. Brazee*, 183 Mich., 259.

This latter case is one of very great importance in determining the questions involved in the case at bar and was affirmed by the Supreme Court of the United States in 241 U. S., 340. In the case last cited the statute limited the license fee of one hundred dollars to cities of over two hundred thousand inhabi-

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tants, and there was but one city in the state that came within that classification, and yet the act was held not to be thereby rendered unconstitutional.

In the case of *Gundling v. Chicago*, 177 U. S., 183, an ordinance of the city of Chicago authorizing the issuance of a license to persons to sell cigarettes upon the payment of \$100 was held valid although it delegated to the mayor the entire subject of granting and revoking licenses to persons engaged in the business. The contention was made in that case that the ordinance vested arbitrary power in the mayor and that it was for this reason invalid.

The most recent utterance of the Supreme Court of the United States on the questions now under consideration may be found in a group of cases decided by that court on January 22, 1917, and entitled *Hall, Superintendent of Banks of the State of Ohio, v. Geiger-Jones Company*; also, *Caldwell, as Attorney-General of South Dakota, v. Sioux Falls Stock Yards Co. et al*; also, *Merrick et al v. Halsey & Company et al*. These cases may be found in 242 U. S., 539, and following.

Many of the cases which have been cited were based on statutes which contained provisions for a review by the courts of the decision made by the commissioner or board having charge of the issuing and revocation of licenses. Indeed it is probable that most of the statutes on this subject have a provision of that character; but all of the statutes do not have this provision. In the group of cases last cited such provision was found to exist in the statutes under review, and in some of those cases comment was made on that provision; but in the case last cited the court held that the absence of such provision did not render the statute invalid since there is a presumption against wanton action by any commissioner, and if there should be such disregard of duty a remedy in the courts would necessarily be implied.

I call attention to *Reetz v. Michigan*, 188 U. S., 505, which was an action arising under a statute of that state for the appointment of a "board of registration in medicine," and required a license from any person seeking such registration. I quote one proposition of the syllabus in that case:

"There is no provision in the federal constitution forbidding the state from granting to a tribunal, whether called a court or a board of registration, the final determination of a legal question. Due process of law is not necessarily judicial process, nor is the right of appeal essential to due process of law."

In the course of the opinion Mr. Justice Brewer uses the following language:

"But while the statute makes in terms no provision for a review of the proceedings of the board, yet it is not true that such proceedings are beyond the investigation of the courts. In *Metcalf v. State Board of Registration*, 123 Mich., 661, an application for mandamus to compel this board to register the petitioner was entertained, and although the application was denied yet the denial was based not upon a want of jurisdiction in the court but upon the merits."

It is said that the statute is unconstitutional because it furnishes no standard for determining what constitutes good moral character as used in Section 886 of the General Code. The same objection was urged against the validity of a statute of Ohio providing for the creation of a board of censors of motion picture films (103 O. L., 399), which act was under investigation in *Mutual Film Co. v. Industrial Commission of Ohio*, 236 U. S., 230. Section 4 of the act provided that only such films as are in the judgment and discretion of the board of censors, of a moral, educational or amusing and harmless character shall be passed and approved by such board. Mr. Justice McKenna, speaking for the court, uses this language on page 245:

"The objection to the statute is that it furnishes no standard of what is educational, moral, amusing or harmless, and hence leaves decision to arbitrary judgment, whim and caprice; or, aside from those extremes, leaving it to the different views which might be entertained of the effect of the picture, permitting the 'personal equation' to enter, resulting 'in unjust discrimination against some propagandist film,' while others might be approved without question. But the statute by its provisions guards against such variant judgments, and its terms, like other general terms, get precision from the sense and experience of men and become certain and useful guides in reasoning and con-

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duct. The exact specification of the instances of their application would be as impossible as the attempt would be futile. Upon such sense and experience, therefore, the law properly relies."

The act under which Raabe is prosecuted authorizes the commissioner to refuse to issue or renew a license to an applicant if, in his judgment, such applicant has violated the law relating to private employment agencies, or is not of good moral character. If this language should be construed to vest arbitrary and absolute power in the official named, the statute must needs be held violative of the Constitution; but we do not so read the statute in the light of the cases to which reference has been made. Discretion and judgment must be reposed somewhere in order to make effective a statute regulating employment agencies, and the General Assembly has placed the duty of exercising that judgment and discretion on the commissioner of labor statistics. It does not follow, however, that any conclusion which he may reach is beyond review in the courts. The phrase in the statute, "in his judgment," must be held to mean a reasonable judgment. Even without those words the conclusion which he reached would naturally have to be his judgment. He can not under this statute act from caprice or whim, nor arbitrarily. If, for instance, the official named should refuse to issue or renew a license on the ground that the applicant was not of good moral character, when in truth and in fact there was no foundation for such conclusion by the commissioner, manifestly the applicant who was refused a license would have a remedy in the courts, and the same may be said of that portion of the statute which gives the right of refusing to issue or renew a license if the applicant has, in the judgment of the commissioner, violated the law relating to private employment agencies, and it appears that the conclusion is merely an arbitrary or capricious one. The Legislature will not be held to have intended to confer arbitrary power unless the language of the statute is such as to admit of no other construction.

The statute under review by the court in *People v. Brazee*, 183 Mich., 261, cited *supra*, authorized the revocation of the

license by the commissioner of labor whenever, *in his judgment*, after full hearing, the licensed agency shall have violated any of the provisions of this act, and yet it was held that notwithstanding this language the courts have authority to review the conclusion of the commissioner if exercised arbitrarily.

Similar language is found in the statute under review in *Mutual Film Corporation v. Ohio Industrial Commission*, 236 U. S., 240.

In the case of *Harmon v. State of Ohio*, 66 O. S., 249, the act of the General Assembly of Ohio providing for the licensing of steam engineers was held invalid, because it was held to grant legislative power and contained no criterion for determining when an applicant was "trustworthy and competent." The decision just cited is not in conflict with those heretofore cited in this opinion. Indeed, the case was cited in 236 U. S., 246, and held to be distinguishable from the statute establishing a board of censorship of motion picture films. We think it is also distinguishable from the case at bar.

The liquor license code, 103 O. L., 222, provides that a license shall not be granted to a person who is not a citizen of the United States or who is not of good moral character. This phrase "good moral character" has been used so many times in statutes and decisions of the courts that it would seem to be unnecessary to attempt any definition. Indeed the term defines itself as accurately as the Legislature could define it by any other terms that it might employ along that line.

In *Rose v. Baxter et al*, 7 N.P.(N.S.), 132, Judge Dillon had under consideration a statute authorizing the revocation of a physician's certificate for gross immorality and reached the conclusion that the expression "gross immorality," was not so indefinite as to render the act invalid. We think the reasoning of the court in that case is sustained by the authorities already cited.

We are unanimously of the opinion that the statute under review is not in violation of any provision in either the state or federal Constitution, and the judgment will be affirmed.

CHITTENDEN, J., and KINKADE, J., concur.

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**DETERMINATION AS TO WHETHER OHIO OR
NEW YORK LAW CONTROLS.**

Court of Appeals for Cuyahoga County.

EVA DAVIES LOZIER V. LISTON L. LEWIS, TRUSTEE, ET AL.

Decided, February 11, 1918.

Conflict of Laws—Will made in New York by an Ohio Woman—Presumption That it is to be Administered Under Ohio Law—Relief Denied to the Assignor of an Interest Thereunder Seeking to Revoke the Assignment Because of its Invalidity Under the Law of New York.

The provisions of a will, executed in New York by a resident of Ohio temporarily sojourning in that state, are governed by Ohio law, in the absence of evidence of a contrary intention on the part of the testator; and a beneficiary thereunder who is a resident of New York and has made an assignment of his interest can not thereafter revoke the assignment on the ground that it is in derogation of the law of New York, where the validity of the assignment under the law of Ohio is not disputed.

Goulder, White & Gary, for plaintiff in error.

Treadway & Marlatt and White, Johnson, Cannon & Neff,
contra.

GRANT, J.

Error to the court of common pleas.

The facts necessary to a determination of the question raised by this record are not in dispute.

In 1905, Mary M. Lozier, an inhabitant of Ohio, but then temporarily sojourning in New York, in that state executed her last will, the parts whereof that are material in this controversy, being in the following words:

“Fifth: I hereby give and bequeath to Samuel Reger of the Borough of Brooklyn, County of Kings, City and State of New York, the shares of capital stock in the Lozier Motor Company of New York owned by me, in trust nevertheless to divide the same into four equal parts and to hold one of said

parts for, and to pay the dividends derived therefrom to, William A. Keener, the dividends so received by said Keener to be paid by him in the proportion of two-thirds and one-third to my son Edwin R. Lozier, and his wife Eva Davies Lozier as provided in paragraph sixth of this will with reference to the trust therein created, and to hold one of the three remaining parts for each of my three children, Henry A. Lozier, Jr., Bessie Lozier Gregg and Joseph T. Lozier, as herein provided, paying to each of said three children the dividends derived from the one-third part held for said child.

"In the event of the death of Joseph T. Lozier during the continuance of the trust hereby created for his benefit, the income derivable therefrom shall be paid to his next of kin during the life of Henry A. Lozier, Jr., provided the said trust continues so long.

"In the event of the death of my son Henry A. Lozier, Jr., or my daughter Bessie Lozier Gregg, the dividends derived from the trust created for his or her benefit shall be payable during the life time of Joseph T. Lozier, provided the said trust continues so long, to the next of kin of such deceased child.

"No portion of the stock allotted to any one of these four trusts shall be sold during the continuance of these trusts, without the consent of the trustee and one-half the number of the beneficiaries.

"None of the trusts created in this paragraph shall continue beyond the period of ten years from the taking effect of this will.

"On the termination of the foregoing trusts the one-fourth part of the stock of the Lozier Motor Company of New York held in trust for William A. Keener, or its proceeds in the event of sale having taken place, shall be transferred and delivered over to the said William A. Keener, in trust, however, in the proportions and in the manner and for the uses and purposes described in paragraph sixth of this will; and in the event of the termination of the trust described in the said paragraph sixth prior to the termination of the other trusts created in this paragraph (to-wit, paragraph fifth) the said one-fourth part of the stock held in trust for William A. Keener shall be treated and disposed of as part of my residuary estate disposed of by paragraph seventh of this will.

"On the termination of any one of the trusts created in this paragraph, other than the trust created for William A. Keener, the stock allotted to such trust, or its proceeds in the event of sale having taken place, shall be transferred and delivered over to

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his or her issue, if any, and in default of such issue shall be treated and disposed of as part of my residuary estate disposed of by paragraph seventh of this will.

"Sixth: I give and bequeath to William A. Keener of the Borough of Manhattan, city, county and state of New York, one-fourth of my residuary estate in trust nevertheless, to invest the same and pay two-thirds of the net annual income derived therefrom to my son Edwin R. Lozier during his life, and to pay one-third of the net annual income derived therefrom to Eva Davies Lozier, wife of my said son Edwin R., for life or until she remarries. On the death of my said son Edwin R. Lozier, two-thirds of the trust fund hereby created in this paragraph shall be transferred and delivered over to his issue, if any, and in default of issue the said trust shall be continued until the death or remarriage of Eva Davies Lozier, the income from the said two-thirds to be paid to the said Eva Davies Lozier for life or until she remarries, and upon her death or remarriage be treated and disposed of by paragraph seventh of this will. On the death or remarriage of the said Eva Davies Lozier, the said two-thirds to be paid to the said Eva Davies Lozier for life shall be transferred and delivered over to the issue, if any, which she may have by my son Edwin R. Lozier. In default of such issue the said one-third shall be treated and disposed of as part of my residuary estate disposed of by paragraph seventh of this will.

"In the event of the said Keener's death or his refusing to act as such trustee, or resigning said trusteeship, I hereby designate Liston L. Lewis of the borough of Brooklyn, county of Kings, city and state of New York, as trustee of this fund."

Subsequently and while the testatrix was still, or again, sojourning in New York, she executed a codicil to the will, changing the proportions in which her son and his wife, the plaintiff, should take the income to be derived from the trust created by the body of the testament—a change not material in the present consideration, and making no other.

In 1906 the testatrix died, in this county, being still an inhabitant thereof.

The probate of the will, therefore, appertained to the Probate Court of Cuyahoga County, in which it was accordingly duly proved and is of record.

In 1908 the plaintiff sued her husband for a divorce. The result of that suit was a decree for a divorce absolute, because of the husband's aggression.

The wife's claim for alimony in that action was settled by the parties while her suit was pending—the avails to her being a transfer of the interest of the defendant Edwin R. Lozier arising from the will of his mother in question.

This transfer was evidenced by the following assignment and the coupled power annexed to it:

"Know All Men by These Presents, That I, Edwin Ross Lozier, of New York City, Borough of Manhattan, county and state of New York, in consideration of ten dollars (\$10) to me in hand paid by my wife, Eva Davies Lozier, and other good and valuable considerations, the receipt of which is hereby acknowledged, have sold, assigned, transferred and set over and by these presents do sell, assign, transfer and set over unto Eva Davies Lozier all my right and interest in and under the last will and testament of my late mother, Mary M. Lozier, the same having been executed on the twelfth day of December, 1905, and in and under a codicil to said will and testament of my said mother, Mary M. Lozier, dated the twenty-ninth day of October, 1906, together with every other benefit or advantage thereunder that may now be had or obtained by me, to be held, received and enjoyed by her during her life.

"And I do hereby make, constitute and appoint Eva Davies Lozier my true and lawful attorney, irrevocable, for me and in my name, place and stead, and at her own cost and expense to ask, and during her life demand, and by all lawful ways and means receive from William A. Keener, the trustee named in the paragraph marked 'Sixth' of the said last will and testament, and the paragraph marked 'Second' of the codicil thereto, all moneys directed to be paid or delivered by him to me in accordance with the terms of said will and codicil.

"IN WITNESS WHEREOF I have hereunto placed my hand and seal this thirteenth day of November, 1908.

"EDWIN ROSS LOZIER. L. S."

This paper was duly acknowledged.

The trustee named in the will was a resident of New York, as was recited in it, at the time it was made and so continued when it was proved. He accepted the trust, qualified as trustee and

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took upon himself the performance of the duties imposed by the relation.

The assets constituting the body of the trust, consisting of stocks, bonds and securities, were in New York when the will was made. They remained there till the death of the testatrix and thereupon passed to the first trustee and were in his possession until his subsequent death. When he died, the alternative trustee nominated in the will, the defendant Liston L. Lewis, succeeded to the trust in his stead and to the assets named, in continuity of location in New York. He received his designated appointment from a New York court, in which he gave bond, being domiciled in that state at all times after the testatrix executed the will. Before the commencement of this action, however, he sought and received an appointment as testamentary trustee from the probate court of this county, in which he has accounted as such, in accordance with the requirement of the Ohio statute in that respect. The domicile in New York of both the original and the substitute trustee was known to the testatrix at the time she made the will.

Edwin R. Lozier, the defendant and primary beneficiary in the trust, has been continuously an inhabitant of New York from a time anterior to the execution of the will until the present. His wife, the plaintiff, was domiciled there before the date of the will and so remained till after the execution of the assignment mentioned. She removed to Ohio and was a resident of Cuyahoga county before and at the time she commenced this action.

The trustee paid the plaintiff, regularly, the income assigned to her by her former husband until the year 1915, at which time the one then executing the trust and a present defendant was notified by Edwin R. Lozier to make no other payment to her, because, as he said, he had revoked the assignment theretofore made by him to her, with the power annexed to it, thereby resuming his first right and demanding that all further payments be made to him only. The defendant trustee thereupon ceased making payments to the plaintiff, and declined to do so in response to a demand by her. Whereupon she brought this action

to compel payment to her, she not consenting to the purported revocation of the assignment by her former husband, or to his attempted reclamation of the trust income.

The latter, by way of defense to the action, pleaded and proved a statute of New York, enacted before the execution of the will and substantially operative in that state at all times since, as was said, and which provided as follows:

“The right of the beneficiary to enforce the performance of a trust to receive the income of personal property and to apply it to the use of any person, can not be transferred by assignment or otherwise. But the right and interest of the beneficiary of any other trust in personal property may be transferred.” * * *

Before the notification that the assignment had been revoked this law was somewhat changed in verbiage, but not in substance, operation or effect. The defendant, the trustee, answered, professing to stand neuter and taking the position, in substance, of an interpleading party.

Upon issues properly joined, to which the foregoing recited facts are relevant, the case was brought to trial in the court below without a jury.

The evidence brought forward standing in substance as has now been stated, the court, upon the facts, held the law to be with the defendants and for them gave judgment accordingly.

That judgment we are asked in this proceeding to reverse.

The question is single: Is the case to be determined by Ohio law or that of New York?

Its resolution, either way, makes it simple as well as single. For it is admitted that if Ohio law is to be applied Lozier must keep his engagement, because in this state and by its laws he was at liberty to make it and may be held to it. It is equally certain that the assignment that he undertook to make of his right to the income of the trust fund was in New York by law forbidden, and the attempt to make it was inert and a nullity. The landmark of the defendant's concession at this point is stated in his brief as follows:

“We make no question that for most purposes the will of Mary M. Lozier, though executed in New York, is governed by

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the law of Ohio, where she was domiciled at the time of her death. In all matters relating to the execution of the will, to its construction and validity, the law of Ohio governs; but we think with this concession, the control of the law of Ohio ends."

Of course courts will not be expected to be astute in helping a man depart from his agreement once made, after having received what he deemed a meritorious consideration for making it. Still, except in swaying the balance, what may appear to be an equitable footing can have no place where the question is what we have here.

In matters of contract at least, the thing to be done really is to reach the intent of the parties as to the place and its accompanying law, where and by which the transaction is to be governed. If this can be gathered from the express direction of the instrument, or impliedly from the circumstances, the intent may be found and the question is answered. The rare exception is where the surroundings point to an attempt to commit a fraud on the law, in which case the purpose will be defeated by disregarding the intention. If we may apply that rule to this case, we find no expression in Mrs. Lozier, Senior's, will indicating a purpose or a preference as to where the trust created by it should be executed; the words of the instrument are not demonstrative in that respect; they point out no forum other than that of the will as a whole for the administration of the trust which it creates. The mere fact that the mechanical act of signing the will was performed in New York and away from the settled domicile of the testatrix is not, we think, of itself and without more, significant to confer jurisdiction on the courts of her sojourn in administering it, or any part of it; at most it may be regarded as a circumstance which, in concurrence with others, may fix a governing intent in the matter. Indeed, we do not know that more is claimed for it here. The other surroundings, said to be more or less indicative of an intention to submit the trust to the control of New York law, are that the trustees named in succession were residents of New York to the knowledge of the testatrix when she made her will; that the son then was, and has ever since been, an inhabitant of that state, as was also his

wife up to a time subsequent to the assignment to her by her then husband of his share of the trust income; that the courts of New York without objection took *some* jurisdiction by way of ratifying the testamentary appointment of the alternative trustee and becoming the custodian of his bond, and that the securities constituting the body of the trust were physically in New York, to the knowledge of the testatrix, both when she executed the will and at all times since. It is said to have been the opinion of the court below that from all the circumstances an intention might be found in the mind of the testatrix, amounting to a pointing out of the New York forum rather than that of Ohio in which this trust should be discharged, thus importing into her will the New York law applicable to this part of the instrument, and that the judgment under review proceeded on that footing. The ordinary legal *situs* of stocks and securities is that of the person of the owner; it is ambulatory only as the owner is; it follows and keeps its identity with the domicile of the owner, primarily if not conclusively. This will shows no conscious attempt, or wish, on the part of the owner to separate the *situs* of the securities from herself or to prevent it from following her. She did not bring or send the securities from her own domicile to New York; they were there, fortuitously for aught that appears to the contrary, from the time of their issue. Their being there may have been an accident or from considerations of their safety or convenience of access or use by the owner. But that they were there from a design by her that they should be divorcees from herself—*a mensa et thoro*—does not appear, nor, as we think, can that condition be extracted as a legal consequence of all the facts and surroundings of the case. It can not be that because one dies having a safety deposit box in each state of our Union, or a trust involved in it, his estate must by possibility be administered according to forty-nine different sets of laws, as each may be invoked, subject to all the clashes thence resulting; our text-books on conflict of laws would in that event stand in need of revision and enlargement. In regard to what the New York court did in the case in hand, its position seems to have been no more than that of an honorable

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neutral, as the court below is said to have said. Its action in respect of the bond and ancillary appointment of the nominated trustee, if more than perfunctory, was only to husband the trust in a matter of formality; it evinced no purpose of taking over the substantive jurisdiction to the exclusion of that of origin or to perform other than an office called for by comity between jurisdictions, as we view the matter. And such is said to have been the view of the court of common pleas at this particular point.

We can find in the circumstances of this case no single circumstance which we can regard as a piece of evidence going to show that the testatrix chose the courts of New York rather than those of her own state as the instruments to execute the trust which her will has created. And since no one circumstance points to a designation of a forum to make effectual her purpose, it follows that all the circumstances together will not work that result.

We have examined with proper attention the authorities cited and discussed in the briefs. For the most part they will not be more particularly mentioned here. We have also attended to the distinction claimed to take off the effect of some of the cited cases, the argument being that they have to do with "the question of the validity of the will, and not at all with the question of the assignment of property subject to a trust created by will." We do not purpose to deal with this contention very much, except in result.

It is proper to say in passing that the plaintiff also asks the benefit of Section 47 of the "Decedent's Estate Law" of New York, to neutralize the statute of that state forbidding assignments, already quoted. It is enough to say that the record before us does not show by proof or exemplification that Section 47 is on the statute books of New York at all. We can not consider it.

We proceed to refer to some authorities—mostly text-books—in muniment of the conclusion to which we have come in the case, keeping in view, but not necessarily allowing, the claimed distinction referred to, which must run through all that we have to say on the subject, more or less.

Wharton, Conflict of Laws, p. 1322, says:

"The courts of a state which is neither the domicile of the testator, nor the place where the trust is to be administered, will remit the personal assets found there to the former state or country for the purposes of the trust, though the same would offend its own laws against perpetuities."

Again he says, p. 1325:

"The combined effect of the New York decisions is to establish the rule that to bring a bequest of personal property within the New York statutes against perpetuities and suspension of absolute ownership, the testator must not only have been domiciled in that state, but the will must also contemplate that the trust shall be executed there, or at least it must not provide for its administration elsewhere."

In Page on Wills, Section 35, it is said:

"Where the trust may be executed in the testator's domicile in compliance with law there, a trustee can not make the trust unenforceable by withdrawing the trust funds to another state where such trust is void as in unlawful restraint of alienation."

The author allows two exceptions to the rule: When the testator *directs* that the proceeds be sent to another jurisdiction, there to be applied to the purposes of the trust, the courts of his domicile may help to enforce it by applying the law of that state; but not, as we infer, to *defeat* it. And where the testator directs specific funds to be removed to another state, to be administered there, the law of that state will govern.

In Ruling Case Law, Vol. 5, p. 1024, it is said:

"The general principle that a will of personal property is governed by the *lex domicilii* of the testator applies to the validity of a bequest of personal property as affected by the rule against perpetuities or suspension of the power of alienation, assuming that the will does not fix a definite location, beyond the state or country of the testator's domicile, where the fund is to be held or administered. And it has been held that this rule governs even though the property, the trustee and most of the beneficiaries are in another state, by whose law the bequest would be void. But the purpose of the rule against perpetuities is

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strictly local, and so if a definite place is fixed wherein everything pertaining to the trust shall be located, then the rule changes, and its validity so far as the rule against perpetuities is concerned is tested by the law of the place that has been fixed. So a bequest of personal property, upon a trust to be administered in a foreign country, by the law of which it is valid, will not be held invalid by the courts of the testator's domicile, even though it contravenes the law of that domicile against perpetuities."

Passing from the generalizations of text-writers, we shall now comment on one concrete case, with particular attention to its parallel facts with those of the case at bar in some points which we regard as important. It is *Chase v. Chase and another*, 2 Allen, 101.

The will of an inhabitant of Massachusetts was made in that state and was proved therein upon the testator's death; and the estate was administered there.

This will created a trust as follows:

"I give and bequeath unto my son George Hazen Chase and my friend Jeremiah Hacker of Philadelphia, ten shares in the New Market Manufacturing Company, and the sum of seven thousand dollars to be held by them and the survivor of them upon the following trusts, namely, that they shall keep the same invested in such stocks and securities as they may think best, and also may appropriate any part of it to the purchase of real estate, if at any time they should think it for the interest of my son and his family to do so, and pay the income and annual interest thereof to my son, Philip Brown Chase of Philadelphia, every year during his natural life, for the support of himself and his family and the education of his children, and upon the decease of my said son, my said trustees or survivor of them shall divide the principal of said trust fund in their hands in equal portions among all the issue of my said son."

The son, Philip B. Chase, and his family were residents of Philadelphia, continuously, from the making of the will to the bringing of the action. The will relieved the trustees from giving bond. Both trustees qualified, but before suit was brought the one resident in Philadelphia resigned and thenceforward the trust was executed by the Massachusetts trustee alone.

The son, it was alleged, proved worthless, squandered the trust income in riotous living and allowed his family to be in want.

The wife and their five children thereupon brought their action in the courts of Massachusetts, in the county where the will had been admitted to probate.

The plaintiffs asked for "an order requiring the trustee to appropriate and pay such portion of the income annually towards the maintenance of the family of Philip B. Chase and the education of his children as the court might deem fit and proper, * * * and for other relief." The report then goes on to say:

"The defendant, Philip B. Chase, demurred to the bill, assigning for causes that the court has no jurisdiction of his person, or of any controversy between him and the plaintiff, both being residents of a foreign state; that the bill states no case for equitable relief; and that the will, as set forth, requires the trustee to pay over the trust fund to *him*, and if any subsequent trust is therein created, it can not be enforced in this suit, or by this court."

The whole case was reserved for determination to the Supreme Judicial Court of Massachusetts.

That court proceeded to split the trust, so to say, by holding that Philip was a sub-trustee for his family—although the will in terms vested in him the absolute right to receive the income—and held that the wife and children could enforce the secondary trust in the courts of Massachusetts, and compel the husband and father to share the usufruct with them against his will.

Coming to the question of the disputed jurisdiction of the Massachusetts court, Chief Justice Bigelow said:

"The objection to the jurisdiction of the court can not prevail. The residence of the trustee and *cestuis que trust* out of the commonwealth *does not take away the power of this court to regulate and control the proper administration of trust estates* which are created by wills made by citizens of this state, and which have been proved and established in the courts of this commonwealth. The legal existence of the trust takes effect and validity from the proof of the will and the right of the trustee to receive the trust fund is derived from the decree of the probate court."

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The chief justice then says that the residence in the state of the acting trustee—the differentiating fact between that case and this case—is “another ground” for taking jurisdiction, his person being within the grasp of the local courts, giving the latter the physical power by injunction to restrain him from making payment of the income to the named beneficiary in the trust. But this ground is in muniment of that already taken independently, and not at all in derogation of it or of the principle substantively asserted outside of it; the court assumed full jurisdiction without that consideration.

It should seem as if here were something more than passing on the validity of the will within the only limits which the defendant's brief allows may be done, namely, as to the formal execution, probate and record of it. In other words, it deals, effectually, with the *essential validity* of the will, in distinction from its formal validity—a difference much discussed in the cases, and the power to do which seems to be clearly denied in the brief. It declares the paramount authority of the courts of, Massachusetts “to regulate and control the proper administration of trust estates,” over that of the jurisdiction of the domicile of both the beneficiary claiming and the one resisting, at the suit of the former over the protest of the latter—his sole enjoyment of the income having been exercised for years and therefore not denied as a vested right of his. It enters the very citadel of the trust—and of the brief here, as we are given to understand it—seizes upon what is claimed to be an inviolable right to the contrary, and sequestrates and deflects to the enjoyment of others than the first taker a portion of what the will says shall be given to him.

This appears to be an essential part of the validity of the will, penetrating into the domain of administration of the trust created by it, to a remote effect. Certainly we do not have in the case we are discussing the matter of the voluntary and perhaps eager transfer of the trust income by one who seems to have received what he regarded as value for the assignment. But we *do* have a case where the court of the testator's domicile steps in and does the assigning for him, against his will, rendering to

him nothing which he thinks is of value to him, and over his pleaded objection to its jurisdiction, and so works the assigning for him, asserting its essential power to do so.

It is also true that the court deduces the sub-trust from the will, and so far forth may be said to construe the will—for the brief in places seems to include construction with validity and so to broaden the field of inquiry. But there was no need to construe the will as to whom it directs the trust income to be paid; as to *that*, the will was plain. It was to be paid to Philip Chase. But the court did interfere to divert the income from Philip after he became entitled to it, to a different application. That other application may have been forbidden by the law of Pennsylvania. It was not prohibited by the law where the will was of record and whence the power to make the changed application was derived, as the court held.

It is quite possible, as matter of course, that we do not acutely apprehend the full force of what is meant by "validity," as that term is used in the following extract from the brief:

"As a matter of fact, both these cases deal exclusively with the question of the validity of the will, and not at all with the question of the assignment of property subject to a trust created by will."

We think we *do* understand, however, that the Massachusetts court, in the case cited, did "deal" "with the assignment of property subject to a trust created by will," and followed the assignment until the property was put to the use of another. It disturbed, rudely and with violence, the trust, which up to that time was getting along very well, both the trustee and the primary beneficiary—as well as the courts of their domicile, as far as we know—being satisfied with it, and neither of them invoking the authority of the Massachusetts courts. The difference is that the court made the assignment *in invitum*, and not the one to whom the settlor in the trust had in the first instance given the right to make it. And in so doing the court asserted its jurisdiction as superior to that of the one thus made the compulsory assignor. Whether the legal effect should be different because in one case the transfer was forced and in the other was voluntary

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and for value, may be a question. If there is a difference in point of merit, it is to the advantage of the plaintiff, as we think. In either case it is a matter of contribution to the support of family dependents and in both cases at last it was brought to the point of the contribution being forced by the courts. The jurisdiction invoked to do the forcing resided—so the Massachusetts court says—in the domicile of the settlor and the probate of his will clear through to the end of directing for whom the trust income may in a proper case be expended. The defendant in this case contends “that the validity of this assignment is to be determined by the law of New York”—the domicile of the testator and the probate of his will being in Ohio.

We probably fail to grasp, or at least to appreciate at its appraised value, the distinction, so much insisted on in the brief, that the physical presence of the stocks in New York and the domicile in that state of the assignor and the assignee in the assailed transfer, of themselves render the cases cited by the plaintiff totally inapplicable. In *Chase v. Chase* the domicile of all the parties was in a state outside of that which took jurisdiction. No mention is made of where the corpus of the trust fund was or in what it consisted. It was not deemed in any way decisive of what law should govern in the disposition of the case, the court proceeding entirely on other grounds to graft the sub-trust on the first one and then to administer it. The demurrer to the bill did not assign the locus of the fund as in any way testing the jurisdiction; the allegation at that point was that the *cestuis*—both first and secondary—resided in a foreign state. On the authority of that case *Perry, Trusts*, Section 71, lays down the unqualified rule, as follows:

“If a trust is created by the will of a citizen of a particular state, and his will is allowed by the probate court of that state, and a trustee is appointed by the probate court, courts of equity will have jurisdiction over the trust, although both the trustee and the property are beyond the jurisdiction of the court.”

Our inclination is, so far as the discussion thus far has gone, to hold that the undisputed facts of the case are not operative to deprive the Ohio courts of jurisdiction and to measure the

rights and liabilities of the parties by the New York law disabling Mr. Lozier in a proper case from making the assignment which evidenced his engagement with his wife, otherwise meritorious and for which he agreed he had received value.

If, however, we are mistaken in that conclusion, another consideration is urged upon us and on which we feel we can rely with confidence in coming to a result. The principle is this: If the jurisdiction is claimed for two courts, in one of which the transaction is valid and void in the other, the intent of the parties should govern and to establish *that*, in the absence of stipulation by them or of circumstances pointing to a controlling implication, they must be deemed to have acted in contemplation of the validity rather than the avoidance of their engagements; in such case the presumption is against an intent to create a barren and inappropriate right.

The proposition, in the main case relied on here, *Pritchard v. Norton*, 106 U. S., 124, is stated thus:

“A contract is governed by the law with a view to which it is made, because by the consent of the parties that law becomes a part of their agreement, and it is therefore to be presumed in the absence of any express declaration or controlling circumstances to the contrary that the parties had in contemplation a law according to which their contract would be upheld rather than one by which it would be defeated.”

In the opinion in that case Mr. Justice Matthews discusses, painstakingly and clearly, the whole question from both points of view—principle and authority.

The rationale of the rule is found in *Phillimore, Int. Law*, 469, as follows:

“It is also to be remembered that in obligations it is the will of contracting parties, and not the law which fixes the place of fulfillment—whether that place be fixed by *express words* or by *tacit* implication—as the place to the jurisdiction of which the contracting parties elected to submit themselves. * * * As all the foregoing rules rest upon the presumption that the obligor has voluntarily submitted himself to a particular local law, that presumption may be rebutted either by an express declaration to the contrary, or by the fact that the obligation is illegal by

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that particular law, though legal by another. The parties can not be presumed to have contemplated a law which would defeat their engagements."

We think the same principle has been imposed by the courts of Ohio in the enforcement of contracts supposed to be tainted with usury. In *Scott v. Perlee*, 39 O. S., 63, it is said:

"Where such a contract, in express terms, provides for a rate of interest lawful in one but unlawful in the other state, the parties will be presumed to contract with reference to the laws of the state where the stipulated rate is lawful, and such presumption will prevail until overcome by proof that the stipulation was a shift to impart validity to a contract for a rate of interest in fact usurious."

In *Pritchard v. Norton*, *supra*, further comment is made of the rule as laid down in *Phillimore*, as follows:

"At all events, it is a circumstance highly persuasive in its character, of the presumed intention of the parties, and entitled to prevail, unless controlled by more express and positive proofs of a contrary intent."

We think it has not been so overcome in this case and that it ought to prevail.

The result of its prevailing in holding one to his engagement instead of permitting him to break it, after securing its benefit, does not render the rule any less satisfactory in our estimation. We apply it, however, not for that reason, but because it states the law of the case, as we think and hold.

Upon the facts in the record, the law is with the plaintiff.

It results that the learned court who tried the case below was in error in applying to the facts the law of New York instead of Ohio.

For that reason the judgment under review is reversed. As the material facts in the case are not disputed; as all parties waived a jury trial in the court below, thereby submitting to the judgment of that court and by consequence to this court which has now overruled that judgment, and as the judgment that should have been rendered there depends for its liquidation

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to a money amount only upon a computation, we now proceed to render the judgment which should have been rendered there; that the plaintiff recover according to the prayer of her petition and that the cross-petitioning defendant trustee have judgment of exoneration upon his satisfying the judgment for the plaintiff.

An entry to that effect may be prepared.

DUNLAP, J., and LIEGHLEY, J., concur.

**CONTEMPT IN FAILING TO PAY MONEY INTO COURT FOR
SUPPORT OF MINOR CHILDREN.**

Court of Appeals for Lucas County.

SAMUEL ELMER RHYNARD V. ROBERT S. GARDNER, SHERIFF
OF LUCAS COUNTY.

Decided, December 13, 1916.

Contempt—Procedure Where the Sentence is Illegal But the Conviction Lawful—Validity of an Order in a Divorce Proceeding—Requiring the Father to Pay Money Into Court to be Held for the Future Benefit of His Minor Children.

1. The court of common pleas has power and jurisdiction in an action for divorce to order the payment of a fixed sum monthly to the clerk of the court to be kept intact by him for the future use and benefit of the children until the further order of the court, and such order can not be questioned collaterally in habeas corpus.
2. Statutes authorizing punishment for contempt of court are strictly construed and in a conviction under Section 12142, General Code, the person convicted can not be sentenced to remain in prison for non-payment of fine and costs.
3. Where the conviction for contempt of court is lawful, but the sentence imposed is illegal, reasonable opportunity will be given the proper tribunal to re-sentence before the discharge in habeas corpus becomes effective.

Hankison, Axline & Deeds, for petitioner.

J. C. D'Alton, Prosecuting Attorney, and *W. T. S. O'Hara*, contra.

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RICHARDS, J.

The petitioner, Samuel Elmer Rhynard, has duly applied to this court for a writ of habeas corpus, and counsel representing the defendant have been notified and the application heard on its merits.

It is claimed that the petitioner is unlawfully restrained of his liberty in the jail of Lucas county by the sheriff of said county. On this hearing it appears that the petitioner had begun an action in 1914 for divorce from his wife, Pernie Rhynard, and that such proceedings were had that he was granted a divorce from her in the court of common pleas. The parties had two minor children. Shortly after the decree of divorce, which also provided for the custody of the minor children, was rendered, the cause came on further to be heard on a motion of Mrs. Rhynard to modify the decree as to the custody of the children, and the decree was thereupon so modified as to give her the custody of one of the children until the further order of the court, and to give the nominal custody of the other child to the husband so long as the child remained in the Ohio Soldiers and Sailors Orphans' Home in Xenia. The portion of the order immediately following is that which is claimed to be beyond the power and jurisdiction of the court, and is that against which special complaint is made, and for the failure to comply with which the petitioner is imprisoned. It reads as follows:

"It is further ordered that commencing May 1st, 1915, and on the first day of each and every month thereafter, until further order of the court, the plaintiff Samuel E. Rhynard pay to the clerk of the Common Pleas Court of Lucas County, Ohio, the sum of twenty (\$20) dollars, which said money shall be kept intact by said clerk of court for the future use and benefit of said minor children until further order of this court."

A careful examination of the language of this portion of the decree to which objection is particularly made, will disclose that it is not subject to all of the criticisms urged against it. It is said that the court had no power or jurisdiction to provide for the accumulation of a fund which might be used at some time in the future for the benefit of the minor children. The children

had, of course, been supported in the past, and the language of the decree prohibits using the money to be paid by the father of the children in satisfaction of any claim for their support already furnished, and contemplates that it shall only be used for such support as may be furnished them after the date of the decree. The court would, of course, retain jurisdiction of the children thereafter without specifically so providing in the decree, but the decree, nevertheless, clearly and by particular language retains such jurisdiction and control of the children and the fund, subject to the further order of the court. It can not fairly be said that the decree contemplates the accumulation indefinitely of a fund to be used in the remote future for the benefit of the children. A more reasonable construction is that the order contemplates the payment of the money to the clerk of the court of common pleas to be safely kept until the court should be better advised as to the specific application to be made of it for the benefit of the minor children. That determination might be made at any time after entering the decree providing for the payment. We are of the opinion that the court had jurisdiction to make this order and did not exceed its power in so doing, and its judgment can not be collaterally impeached in habeas corpus. *Bly v. Smith, Sheriff*, 94 O. S., 97.

Samuel Elmer Rhynard was prosecuted in contempt proceedings for failure to comply with this order, and on such prosecution was adjudged to be guilty, and was sentenced to pay a fine of fifty dollars and the costs of prosecution and to be committed to the Lucas county jail for a period of ten days, and to stand committed in such jail until the fine and costs were paid, or he was otherwise released according to law. The conviction was evidently under Section 12142, General Code, which reads as follows:

"Sec. 12142. The court shall then determine whether the accused is guilty of the contempt charged. If it be adjudged that he is guilty, he may be fined not exceeding five hundred dollars, or imprisoned not more than ten days, or both."

Statutes authorizing punishment for contempt must be strictly construed, and nowhere in this section is there contained any

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authority to adjudge that the defendant shall be imprisoned until the fine and costs are paid. The sentence may be for such sum as is warranted by the facts and within the limitation named in the section, and the sentence of imprisonment can not exceed the limit specified in the statute, to-wit, ten days. In the case under consideration the sentence is that the petitioner be confined in the jail until the fine and costs are paid or until he is otherwise released according to law. The court was without power to sentence the petitioner otherwise than as fixed by the terms of the statute.

The principle has been directly so announced in *Lubbering v. State of Ohio*, 19 C. C., 658, and has been re-announced by the circuit court in this county in *Müller and Diehl v. Toledo Grain & Milling Co.*, 21 C. C., 326. It follows that the writ of habeas corpus should issue and that the petitioner is entitled to his discharge from this sentence.

We discover, however, no illegality apparent in the record in the conviction of the defendant on the charge of contempt and the petitioner is not, therefore, entitled to his discharge without reasonable opportunity being given to the proper authorities to see that he is re-sentenced on said conviction. I call attention to *Medley, Petitioner*, 134 U. S., 160, 174; also, *Savage, Petitioner*, 134 U. S., 176; also, *In re Bonner, Petitioner*, 151 U. S., 242. The proper procedure in cases of this character is discussed and clearly announced in 12 R. C. L., 1252, Section 70. In the cases above cited the Supreme Court of the United States had under consideration a situation where the sentence was illegal but the conviction lawful, and were confronted with the practical question of what should be done with the petitioner when the writ of habeas corpus was issued; and in each case delayed the taking effect of the order until such time as the proper authorities could be notified and have opportunity to take such action as they saw fit.

While the writ of habeas corpus is awarded in this case and the petitioner ordered discharged, a copy of this opinion will be furnished to the trial judge in the court of common pleas who sentenced the petitioner, for such further action as he may wish

to take on the conviction of the petitioner in the contempt proceedings.

The discharge in habeas corpus is ordered not to take effect until four o'clock this afternoon.

Of course, nothing in this opinion is intended to express the views of this court in a case in which the contempt consists in the omission to do an act which the accused can yet perform and the finding and judgment of the court so show, as provided in Section 12143, General Code.

CHITTENDEN, J., and KINKADE, J., concur.

REARRANGEMENT OF SCHOOL DISTRICTS.

Court of Appeals for Ashland County.

THE MONTGOMERY TOWNSHIP BOARD OF EDUCATION ET AL V. THE
COUNTY BOARD OF EDUCATION OF ASHLAND COUNTY ET AL.

Decided, October 17, 1917.

Schools—Action to Enjoin Creation of a New School District—Right of Electors to Withdraw their Names from Remonstrance to Proposed Action—Section 4736.

Electors signing a remonstrance against the rearrangement of school districts are at liberty to withdraw their names at any time within the thirty day period, or until official or judicial action has been taken.

C. H. Workman, for plaintiff.

Mykrantz & Patterson, contra.

HOUCK, J.

This cause comes into this court on appeal from the Common Pleas Court of Ashland County. The plaintiffs seek to enjoin the county board of education of Ashland county from creating what is known as the Nankin Rural School District, the same being created out of certain territory lying and being in Orange and Montgomery townships in said county.

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Waiving the question as to whether or not the theory upon which the case was presented to this court by counsel is a correct and legal one, we will pass upon the case as thus presented, which was submitted upon a transcript of the evidence taken in the common pleas court. Counsel for plaintiffs insist—

First. That under the facts as established by the evidence submitted and the law governing them, the county board of education was without power or authority to create the school district in question.

Second. That there was an abuse of discretion on the part of the county board of education in the creation of said school district.

Third. That within thirty days after the filing of the notice to the boards of education in the territory affected a majority of the qualified electors thereof filed a written remonstrance with the county board against the arrangement of the school district so proposed.

We do not deem it necessary to discuss the first two claims further than to say that we have examined the evidence offered in the case, and from the undisputed facts we hold that these claims are not well taken, and are entirely without evidential facts or law to support them or either of them.

The third question raised by counsel for the plaintiffs, arises on the referendum part provided by Section 4736, General Code, as found in Volume 106, Ohio Laws, page 397, which reads:

“The county board of education shall arrange the school districts according to topography and population in order that the schools may be most easily accessible to the pupils, and shall file with the board or boards of education in the territory affected, a written notice of such proposed arrangement; which said arrangement shall be carried into effect as proposed unless, within thirty days after the filing of such notice with the board or boards of education, a majority of the qualified electors of the territory affected by such order of the county board, file a written remonstrance with the county board against the arrangement of school districts so proposed. The county board of education is hereby authorized to create a school district from one or more school districts or parts thereof. The county board of education is authorized to appoint a board of education for such newly created school district and direct an equitable division of the

funds or indebtedness belonging to the newly created district. Members of the boards of education of the newly created district shall thereafter be elected at the same time and in the same manner as the boards of education of the village and rural districts."

The facts in the case at bar are that in said proposed Nankin rural school district there were 220 qualified electors on the date of the filing of the remonstrance, which remonstrance against said proposed district contained the names of 120 qualified electors.

It is further conceded as a fact that 15 of the electors who had signed the remonstrance withdrew their names from same, which was done within the thirty day period, being the period within which the remonstrants could file a remonstrance.

It is earnestly urged by counsel for plaintiffs that after the remonstrance was filed the signers thereof were without power to and as a matter of law had no right to withdraw their names therefrom. In other words, that the signers had lost their power of recall and the board of education its authority or jurisdiction in the premises.

We can not agree to this principle of law claimed by learned counsel for the plaintiffs in this respect, because we are of the opinion that it is too narrow a construction placed upon these facts, which would in effect bar an elector from withdrawing his signature from a remonstrance, although the full period in which the remonstrance could be filed with the board of education had not elapsed. We hold the rule of law to be in such a case that the electors signing the remonstrance had the right, or as many of them as so desired, to withdraw their names from same at any time within the thirty day period, or until official or judicial action had been taken upon the remonstrance; and neither of these having occurred in the present case, in our judgment, the withdrawal of the fifteen electors who signed the remonstrance was not only their privilege but a legal right which they could exercise under the conceded facts in this case.

It therefore follows that if fifteen of the electors have withdrawn from the remonstrance, which left only 105 legal remonstrants, and this not being a majority of the electors in the pro-

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posed new school district, that no claim can legally be made by plaintiffs that a remonstrance such as could be claimed under the above section was presented or before the board of education.

Therefore, assuming that such remonstrance, if signed by the proper number of electors and presented within the time prescribed by law would, in effect, invalidate the proposed new school district, it will be observed that inasmuch as this provision of the statute had not been complied with, plaintiffs can not thereby claim any legal rights thereunder.

We do not deem it necessary to discuss further the facts nor the law of the case other than to say that many of the questions here involved have heretofore been determined by this court in other cases, as well as by the Supreme Court of our state. It therefore follows, from what we have already said, that the plaintiffs are not entitled to the relief prayed for in their petition, and it is the judgment of this court that the petition of plaintiffs be dismissed and that the injunction heretofore allowed be dissolved, and that the costs of this case be paid by plaintiffs.

POWELL, J., and SHIELDS, J., concur.

**AUTHORITY TO REVIEW THE JUDGMENT OF THE COMMON
PLEAS IN A CONTESTED ELECTION CASE.**

Court of Appeals for Lucas County.

CHARLES W. MCGUIRE V. CHARLES M. MILROY ET AL.

Decided, March 31, 1916.

Elections—Contests of, Are in the Nature of Special Proceedings—Jurisdiction of the Court of Appeals to Review Judgments of the Common Pleas in Such Cases—As to the Exercise of Judicial Power in Political Matters.

By virtue of the provisions of Section 12247, General Code, as amended 103 O. L., 431, the judgment of a court of common pleas rendered in a proceeding to contest the election of a mayor of a city, may be reviewed on error in the court of appeals.

Ray & Cordill and Julian H. Tyler, for plaintiff in error.

J. K. Hamilton, S. S. Burtsfield and George P. Hahn, for the defendant in error, Charles M. Milroy.

RICHARDS, J.

Error to the court of common pleas. On motion to dismiss petition in error.

This proceeding in error grows out of a contest of the election held on November 2, 1915, for mayor in the city of Toledo. As a result of that election the election officials returned that Charles M. Milroy was duly elected to the office of mayor. Shortly thereafter proceedings were commenced in the court of common pleas to contest the election, by filing in that court a notice of appeal, the same being filed by Charles W. McGuire, as contestor, and the contestees named therein being Charles M. Milroy, George A. Murphy and Carl H. Keller. This proceeding was heard in the court of common pleas before three judges of that court sitting together for that purpose, and by the judgment of that court, as rendered by said judges, it was found that Charles M. Milroy was duly elected mayor of the city of Toledo, and it was ordered and adjudged by the court that the notice of appeal be dismissed and that the contestor pay the costs of the proceeding.

A petition in error was filed in this court to reverse this judgment, and Charles M. Milroy, by his counsel, has filed a motion for an order dismissing the petition in error for the reason that this court has no jurisdiction of the matters complained of therein. This case has been submitted to this court only upon said motion, and the sole question to be now adjudicated is whether this court does or does not have jurisdiction on a proceeding in error of this character.

Article II, Section 21 of the Constitution of Ohio, empowers the General Assembly to determine before what authority and in what manner the trial of contested elections shall be conducted. This provision of the Constitution empowers the General Assembly to confer jurisdiction upon any of the courts to hear and determine election contests; and it is held in *Thomp-*

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son v. Redington et al, 92 O. S., 75, that authority conferred by virtue of this provision is not judicial power, but political power. See also *Link v. Karb, Mayor*, 89 O. S., 326.

Pursuant to the authority thus conferred by the Constitution, the General Assembly has enacted, in Section 5169, General Code, that in cities the election of a mayor may be contested in the manner provided for a contest of the election of county officers. Other sections of the General Code provide the manner of such contest, it being enacted in Section 5148, General Code, that it is to be by appeal to the court of common pleas; and by Section 5151, General Code, that the contest shall be heard and determined by the court, if then in session, and if not then in session, at the next term thereafter. Section 5152, General Code, provides for the method of conducting the trial, and the following section provides that any matter involved in the proceeding may be determined by the court on motion, otherwise the case shall be heard in its regular order upon the docket. This section concludes with a provision that the court shall render judgment against the party failing in the action, for all costs of the contest.

Counsel for the contestee claim that the judges of the court of common pleas, in sitting as a court to determine the contest, were not exercising judicial power, but were only in the exercise of political power, and that, therefore, any judgment which may have been rendered can not be reviewed on error by this court. The right of review on error is, of course, a matter which must depend on statute, and unless conferred by statute such right does not exist. It is provided in Article IV, Section 6 of the Constitution, that courts of appeals shall have jurisdiction to review, affirm, modify or reverse the judgments of courts of common pleas and other courts of record, as may be provided by law. Following this constitutional provision, the General Code, Section 12247, as amended 103 O. L., 431, provides, in substance that a judgment rendered, or final order made, by a court of common pleas or by a judge thereof, may be reversed, vacated or modified by the court of appeals. Our Supreme Court in a number of cases has sustained proceedings in error brought to

reverse judgments rendered by courts of common pleas in election contests. These decisions have apparently been rendered without giving particular consideration to the question whether the lower court was in the exercise of judicial power or political power, the court reaching the conclusion, under the section to which reference has just been made, that the right of the upper court to review such judgments was thereby conferred. Numerous cases of this character are cited by counsel, but I only need call attention to one or two. See *Lehman v. McBride*, 15 O. S., 573, and *Powers v. Reed et al*, 19 O. S., 189. The Supreme Court in rendering these and like judgments was evidently not much concerned with the question as to whether the power that was being exercised was political power or judicial power, but assumed that in either event the right to prosecute error existed by virtue of the statutes applicable to actions generally. True, the contest of an election is not a civil action, but a special proceeding, but the statute for prosecuting error applies as well to final orders and judgments entered in special proceedings as to those entered in civil actions. The question was before the Supreme Court of Indiana and that court held that the right of proceeding in the upper court to set aside a judgment rendered in an election contest existed by virtue of the general statutes. See *Weakley v. Wolf*, 148 Ind., 208, 213.

The method of procedure as set out in the sections of the General Code to which attention has been called (Sections 5148 to 5153, General Code) clearly indicates that the court is required to proceed substantially in the manner in which courts usually proceed in the trial of ordinary litigation, excepting that the issues are not made up by pleadings, and provides that after the trial shall have been concluded the court shall render a judgment based on the evidence and the law. These provisions indicate that the court is invested with all the indicia of judicial action. I call attention to 3 Corpus Juris, 373, where the learned authors of the article on appeal and error state, in well chosen language and in very guarded terms, the rule applicable to the exercise of such authority. It is as follows:

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“It may be stated as a general rule that, where any power is conferred upon a court, to be exercised by it as a court, in the manner and with the formalities of a court, and in its ordinary proceedings, the action of such court is to be deemed judicial, *irrespective of the original nature of the power*, and the determination of the court thereon may be, therefore, appealable.”

It was held in *Moore v. Sharp*, 98 Tenn., 65, that a court in determining an election contest involving the office of sheriff does not sit as a special tribunal but as a court in the exercise of its judicial functions.

In a republican form of government the right of franchise is one of the most valuable rights, and in order that it may be preserved and protected the right is provided to contest the election of any candidate for office. If the judgments of the courts rendered in determining mere property rights are subject to review by proceedings in error, much more so should the judgments of tribunals determining the right to an office filled by election. We can not believe that either the people, in adopting the Constitution, or the General Assembly in providing for the contest of elections for such an important office as that of mayor of a city, intended to make the judgment entered in the court of common pleas absolutely final, but are clearly of the opinion that such judgment is one which, within the language of Section 12247, General Code, as amended 103 O. L., 431, may be reviewed on error in the court of appeals.

The motion to dismiss the petition in error will, therefore, be overruled.

CHITTENDEN, J., and KINKADE, J., concur.

**DETERMINATION AS TO THE CHARACTER OF THE
LEGACY BEQUEATHED.**

Court of Appeals for Franklin County.

SIMEON NASH, AS EXECUTOR OF THE LAST WILL AND TESTAMENT
OF MARY MAXON NASH, DECEASED, v.
DARIEN C. HAMILTON ET AL.

Decided, January 15, 1918.

Wills—Bonds Bequeathed But Afterward Sold by the Testatrix—Bequest Demonstrative and Ordered Satisfied Out of Other Funds of the Estate.

1. A bequest of \$2,000 of the first mortgage bonds of the Gallipolis Gas & Electric Company is a demonstrative and not a specific legacy.
2. The bonds described having been converted by the testatrix, the legacy is not thereby adeemed but may be satisfied from any property or fund of the estate not specifically devised or bequeathed.

Williams & Nash, for plaintiff.
G. C. Bibbe, contra.

ALLREAD, J.

On appeal.

This cause involves a construction of the following clause of the will of Mary Maxon Nash:

“To my sister Darien C. Hamilton, wife of F. W. Hamilton, I give and devise the following property: * * *.

“(c) \$2,000.00 of the first mortgage bonds of the Gallipolis Gas & Electric Company, said bonds being secured by mortgage upon both the gas and electric plants.”

At the time of the execution of said will the testatrix owned four first mortgage bonds of the par value of \$2,000 issued by the Gallipolis Gas & Coke Company, which operated a gas and electric plant in said city and which were evidently the bonds contemplated in the provision above quoted.

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Subsequent to the making of the will, the testatrix sold two of said bonds for the sum of \$1,016.92. The other two bonds were, in the lifetime of said testatrix, liquidated, the testatrix receiving therefor the sum of \$950.

At the time of the testatrix's death she held no bonds in said company.

Counsel for Darien C. Hamilton contends that the bequest under consideration is primarily one of \$2,000, and that the bonds referred to merely designate the fund from which the bequest is to be raised.

On the other hand, counsel for the executor contends that the primary bequest is of the said bonds, and that the \$2,000 is merely descriptive of the bonds.

If the latter contention prevails then it would follow that the bequest was specific and that the sale of the bonds by the testatrix would have the effect of adeeming or revoking the legacy.

If the former contention is adopted the bequest would become a demonstrative one, to be realized first from said bonds and in the absence of such bonds from other funds of the estate not specifically devised.

The respective contentions have been supported by counsel in able and exhaustive briefs in which all the leading authorities have been cited and reviewed.

In proceeding to a consideration of the construction of the clause above quoted, we find that the authorities are practically unanimous that, where the terms of a will are ambiguous or doubtful, the courts are strongly inclined against a specific legacy, and favor a construction which will make the same either general or demonstrative.

The reason for this is apparent when the nature of a specific devise is considered. The property which is made the subject of a specific devise is often disposed of in the lifetime of the testator, and while the proceeds may remain in the testator's estate, yet such proceeds can not, for obvious reasons, be made liable to the specific devise. In many cases, therefore, the specific devise fails by operation of law, when the testator did not actually intend to adeem or revoke the legacy.

This rule of construction is thus stated by Wood, J., in *Gilbreath v. Winter Ex'rs*, 10th Ohio, on page 69:

"The distinction which marks the specific from the demonstrative legacy is frequently nice and difficult, but it is the oft repeated language of the books that courts lean against the former, and it is with regret the chancellor declares he finds the intention of the testator establishes a specific legacy."

The same rule is thus stated in the case of *Kenaday v. Sinnott*, 179 U. S., 606:

"4. Certain familiar rules of construction of wills reiterated; (a) that the intention of the testator must prevail. * * * (c) That the courts in general are averse from construing legacies to be specific."

Many other authorities are to the same effect. We, therefore, come to a careful examination of the language employed to determine whether the legacy was clearly intended to be specific.

The case of *Rote v. Warner*, 17 C. C., 342, is cited. In this case the devise was of \$10,000, payable out of certain shares of the capital stock of certain corporations, and this was held to be demonstrative.

The case of *Ives v. Canby*, 48 Federal, 718, is very similar to the case at bar and holds the devise to be demonstrative.

Counsel for the executor insists that the preposition "of" is significant and is consistent only with the theory of a specific bequest of the bonds. While such construction is possible, yet we have no hesitancy in holding that it does not clearly follow.

Under what we consider to be the almost unanimous trend of authority, we are bound to hold that the provision above quoted creates a demonstrative legacy in favor of Darien C. Hamilton and that, in the absence of the bonds referred to, the legatee is entitled to have the same satisfied out of other funds of the estate not specifically devised.

Decree accordingly.

KUNKLE, J., and FERNEDING, J., concur.

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**WHEN THE RESULT OF AN ELECTION AS OFFICIALLY
MAY BE SET ASIDE.**

Court of Appeals for Cuyahoga County.

Judges Chittenden, Richards and Kinkade, of the Sixth District,
sitting in place of the Judges of the Eighth District.

ALVA R. DITTRICK V. FRANK T. ANDREWS ET AL.

Decided, June 4, 1917.

*Elections—Presumption of Regularity of Official Count—Nature of the
Evidence Required to Warrant Setting the Result Aside.*

When the official count of an election has been made and declared by the board of deputy state supervisors and inspectors of elections, the result is attended with a presumption of regularity that should not be set aside except upon evidence which fairly shows such uniformity of error in such a large percentage of the voting precincts involved as reasonably leads the court to the conclusion that like errors probably have occurred in the precincts from which no evidence is produced, and to such extent as, taking into account the neutralizing effect of similar errors on the opposing ticket, which, in the absence of evidence the court may assume if no fraud is claimed or shown, would probably change the result of the election.

Bernsteen & Bernsteen, for plaintiff in error.

Pierce D. Metzger, contra.

CHITTENDEN, J.

Error to the Court of Common Pleas.

At the election held on November 7, 1916, the Democratic candidates for county commissioners, Frank T. Andrews, Joseph Menning and James T. Kelly, were declared duly elected by the board of deputy state supervisors and inspectors of elections. Thereupon the Republican candidates, Fred H. Kohler, Alva R. Dittrick and John A. MacDonald, appealed from the decision of the board of deputy states supervisors and inspectors of elections to the court of common pleas as provided by statute, and served the necessary notices of con-

test. This resulted in nine election contests in the court of common pleas and these contest cases were consolidated and all proceeded under cause number 153105 entitled *Alva R. Ditt-rick v. James T. Kelly*. Testimony was taken before justices of the peace and the cause came on for trial in the court of common pleas, resulting in a finding in favor of the contestees and a dismissal of the appeal at the costs of the contestants. To this judgment error is prosecuted in this court.

The evidence shows that Cuyahoga county had 576 or 578 voting precincts; that at the election in question 133,483 ballots were cast. The deputy state supervisors and inspectors of elections, upon the official count of the ballots, found that 71,533 ballots had been cast in favor of Woodrow Wilson, Democratic candidate for president, and 51,287 ballots in favor of Charles E. Hughes, Republican candidate for president. The remainder of the ballots were cast in favor of minor candidates for the office of president. The declared result of the election for the office of county commissioners was as follows:

For the Republican candidates:

Fred Kohler	56,574 votes
Alva R. Ditttrick,	56,609 votes
John A. MacDonald	55,414 votes

For the Democratic candidates:

Frank T. Andrews	63,471 votes
Joseph Menning,	61,314 votes
James T. Kelly	59,131 votes

It is not claimed by the contestants that there was any fraud in the conduct of the election or in the counting of the ballots. It is their earnest contention, however, that there were mistakes and errors made in the counting of the ballots and that if all the ballots had been correctly counted the result would have been shown to be the election of the Republican candidates for county commissioners instead of the Democratic candidates.

The contestants called seventy-five witnesses who testified as to errors said to have been committed in seventy-five different

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precincts, and the total number of ballots about which they testified as having been erroneously counted was approximately 1,200. These precincts are said to be distributed generally throughout the city and one or two precincts from each end of the county outside of the city, and that the testimony indicates that errors in the method of counting were being made generally throughout the county, and that if the same ratio of errors was made throughout the county the announced result of the election would of necessity be changed. The mistakes claimed ranged themselves into several classes. The evidence does not show that the same class of mistakes was uniform in all precincts. In some precincts the testimony shows that a given class of claimed errors was made in the counting; that in other precincts another class of errors prevailed; and that in some precincts perhaps errors of each class were testified to.

At the conclusion of the evidence counsel for the contestants moved the court to make an order requiring that all the ballots cast in the county be opened. After argument the court declined to make such an order and dismissed the appeal as above stated. The motion of the contestants was based upon the provisions of Section 5090-1, General Code (106 O. L., 209). This section of the General Code makes provision for the preservation of all ballots for a period of thirty days after the election and for their destruction at the expiration of that time unless there shall be a contest of the election pending at the expiration of the thirty day period. The section reads in part as follows:

“Provided that if any contest of election shall be pending, at the expiration of said time the said ballots shall not be destroyed until such contest is finally determined. In all cases of contested elections, the parties contesting the same shall have the right, after a *prima facie* case of fraud, mistake or error is shown, to have said ballots opened and to have all errors made in counting corrected by the court or body trying such contest; but such ballots shall be opened only in open court or in open session of such body and in the presence of the officers having the custody thereof.”

The real question to be determined in this proceeding is whether the court erred in finding, from the evidence submitted

to it, that the contestants had failed to make a *prima facie* case of mistake or error which would warrant an order to have all the ballots cast in the county opened and recounted.

It may be well to examine the original Section 5090-1 (103 O. L., 265), which was amended by the act above cited. The original act provided that "in all cases of contested elections the party contesting the same shall have the right to have the ballots opened and to have all errors in counting corrected by the court," etc. It was claimed that the original section gave the right to contestants to have all the ballots opened and counted in case of contest.

The correct construction of the act was presented in an election contest case in Jefferson county. That case found its way to the Supreme Court of the state and is found reported as *In re Contest of Election of Fremont Tarr; Tarr v. Priest*, 93 O. S., 199. The court of common pleas had ordered that only the ballots in the two precincts to which evidence of error had been directed should be opened, and refused to order the ballots in the remaining precincts to be opened for the reason that no evidence had been introduced tending to show mistakes or errors as to those precincts. The court of appeals reversed this judgment of the court of common pleas and remanded the case to the court of common pleas with an order to recount all of the ballots in each precinct of the county. While the case was pending in the Supreme Court the amendment found in 106 O. L., above cited, was passed. Thereafter the Supreme Court in deciding the case of *Priest v. Tarr*, reversed the court of appeals and affirmed the judgment of the court of common pleas. In the course of the opinion the following language was used:

"We do not think it was the intention of the Legislature, in the enactment of the provision of Section 5090-1 which we have quoted that the ballots should be used as original evidence for the purpose of discovering errors. Assuming that the grounds of contest set out in the notice of appeal were stated with sufficient definiteness, if, upon the trial before the court, there had been evidence tending to show that errors had been committed in any precinct the court was with authority to order a recount of the ballots in that precinct and have such errors as might

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be found corrected. In the absence of such evidence the court was without authority to act. We conclude, therefore, that the court of common pleas was correct in its refusal to order the ballots in the precincts other than Warren and Toronto No. 1 opened and recounted."

It will be observed that the Supreme Court said that if upon the trial there had been evidence tending to show that errors had been committed in any other precinct that would furnish authority to the court to order a recount of the ballots in that precinct, but that in the absence of such evidence the court would be without authority to order a recount.

The question then is, does this record disclose evidence tending to show that errors were committed in any other precincts than the seventy-five precincts concerning which witnesses testified? It is to be remembered that the court of appeals is not sitting as a trial court but only as a reviewing court, and that before a judgment of the trial court will be reversed the plaintiff in error must show manifest error in the proceedings prejudicial to his rights. The duty rested upon the trial court to pass upon the credibility of the witnesses and weigh the evidence under the well known and well settled rules of law. That court stated that much of the evidence adduced was, in its judgment, entitled to little if any credit.

During the course of argument before this court considerable criticism was passed upon the method employed in ascertaining what the witnesses for the contestants would testify to, and it was intimated that their testimony was in accordance with suggestions made at these interviews. We are not much impressed with the force of that argument. It is the duty of counsel in any lawsuit to ascertain what the witnesses know and will testify to upon the witness stand, and in the matter of an election contest where a large number of witnesses are to be examined it may be that the most practical method of ascertaining what their testimony will be is to exhibit sample ballots and either have the witnesses indicate upon those ballots what the marking was upon the original ballot, or inquire, as was done in this case, whether certain marks shown upon the sample ballots were seen at the

time of the counting, and, if so, how they were counted. It is true that this method might easily be subject to abuse. However, it is apparent that these witnesses very generally were called upon to give their recollection some time after the ballots were counted and it does not appear that they had kept any written record of what was observed by them, and it is self-evident that their recollection would not be very accurate. Other facts appear which bore upon the weight to be given the testimony of the several witnesses and which the trial court might very properly take into consideration in determining the weight to which it was entitled in passing upon the issues presented.

It does appear from the evidence that these mistakes, whatever they were, were a result of the judgment of the election officials in the voting booths as to how ballots marked in a given way should be counted; and, while the inquiry was not pursued, it does appear that mistakes of the kind claimed appeared upon the Republican ticket as well as upon the Democratic ticket. There is an entire lack of evidence, however, as to the extent of those mistakes. A fair inference, perhaps, would be that such mistakes were in about the same proportion upon both tickets. Plaintiff in error, however, earnestly contends that mistakes of a like character upon the other ballots are not material in a contest of this character. That it is only necessary for the contestants to show mistakes upon the Democratic ballots that would indicate a change in the result, and that it was not incumbent upon them to show, nor, indeed, was it proper to be determined by the court whether similar mistakes were made upon the Republican ballots which might neutralize the result claimed by them—at least to a very large extent. In the absence of evidence, and no fraud being claimed, the court is justified in assuming that like errors in the same proportion existed in the other ticket.

The number of precincts involved in the inquiry was approximately one-eighth of the total number of precincts, and the court is required by the claims of plaintiff in error to assume that the errors shown in the one precinct likewise appear in the

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remaining seven precincts about which no evidence at all is presented, or, in other words, that if errors appeared in seventy-five precincts, that is a *prima facie* showing that similar errors occurred in the five hundred or more precincts concerning which no evidence was introduced. But if the assumption of the plaintiff in error be correct that errors of the kind testified to appear in the remaining five hundred precincts, in the absence of testimony to the contrary, and in the absence of any fraud, we think the court would be justified in assuming that similar errors upon the opposing ticket, in the ballot and the counting, would likewise appear throughout the remaining five hundred precincts. We think this contention of the contestors is carrying the doctrine of presumptions to an unwarranted length, and would be extending the decision in *Tarr v. Priest* beyond any limits indicated by the language of that decision.

It is true that the right of franchise is perhaps the most valuable privilege of citizenship. Every citizen is entitled to the free and untrammelled right to cast his ballot as he desires and to have that ballot counted as cast. The state of Ohio, in order to preserve to its citizens, this inestimable right, has provided a system of voting and of counting the votes calculated to effect in every respect the purity of the ballot. Bi-partisan boards of judges and clerks are placed in every voting booth; facilities are afforded for authorized witnesses to observe the counting of the ballots, and as a result the action of the board of deputy state supervisors and inspectors of elections, when the official count has been made and declared, is attended with a presumption of regularity that is and should be as strong as the similar presumption attaching to the action of other administrative boards. We think it would be unwise to permit that presumption to be set aside, except upon evidence which fairly shows such uniformity of error in such a large percentage of the voting precincts involved as reasonably leads the court to the conclusion that like errors probably have occurred in the precincts from which no evidence is produced, and to such an extent as, taking into account the neutralizing effect of similar errors on

the opposing ticket which in the absence of evidence the court may assume, if no fraud is claimed or shown, would probably change the result of the election.

It is not claimed that the errors pointed out are the result of general instructions given to the judges and clerks of election in voting precincts by the county board or by the state officials. If such were shown to be the case a presumption would arise that such instructions had been followed and that like errors would be found in every precinct; but the presumption of errors resulting from instructions of that kind would be made very strong by proof of the giving of such instructions. If the rule announced in the case of *Tarr v. Priest* were applied and the ballots in the seventy-five precincts were recounted it is evident that the result could not be changed, even if full force is given to all that is claimed by the contestants. There would therefore be no reason whatever for incurring the expense and loss of time necessary for a recount of the ballots in these precincts.

We have not deemed it necessary to discuss the claimed errors in the method of counting in view of the conclusion at which we have arrived. Some of the methods were clearly erroneous. This much may be said in general upon the subject of counting ballots in Ohio. No state has gone farther to preserve to its citizens the right to express their choice by ballot and have that choice properly counted, than has the state of Ohio. Section 5070, General Code, paragraph nine, reads:

“No ballot shall be rejected for any technical error which does not make it impossible to determine the voter's choice.”

It will be noted that this paragraph is not a direction that the ballot shall be counted if the intention of the voter can be reasonably ascertained, but it is a positive prohibition against rejecting any ballot for any technical error unless such error makes it impossible to determine the voter's choice. This provision of our law is in recognition of the fact that we have no literacy test for the franchise in this state and that citizens of all degrees of education and intelligence are expected to exercise their right of franchise.

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Upon a careful examination of the entire record in this case we come to the conclusion that the trial court was not in error in declining to direct a recount of all the ballots cast in the county.

KINKADE, J., and RICHARDS, J., concur.

**TRIAL JUDGE WITHOUT AUTHORITY TO DIRECT A
VERDICT IN A WILL CASE.**

Court of Appeals for Union County.

BLANCH MCFARLAND AND IRA TOMLIN, BY LEE STRAUSE,
HIS GUARDIAN AD LITEM, AND ALSO LEGAL GUARDIAN,
v. JAMES E. CLARK ET AL.

Decided, March 14, 1918.

Wills—Contest of—Trial Judge Without Authority to Weigh the Testimony—On Motion for a Directed Verdict—Statement to Jury Need Not Cover All the Evidence to be Offered—Nor is Counsel Restricted by Such Statement as to the Evidence He May Offer—Hypothetical Questions.

1. In a will contest the jury, and not the trial judge, is required to weigh the evidence and determine whether or not the contestant has offered sufficient evidence to overcome the *prima facie* case made by evidence of the original will and record of its probate. Hence, evidence having been offered on the part of contestant tending to prove each material fact in issue, of which the testimony of two physicians, having no personal acquaintance with testator, testifying in answer to hypothetical questions based on facts previously in evidence that testator lacked sufficient mental capacity, it is exercising the province of the jury for the court to ignore the testimony of the physicians and direct a verdict for defendants.
2. A party is not required to state, nor is he limited by what he does state, as to what the evidence in the case will be; hence failing to make reference in a trial statement in a will contest, to a

fact expected to be proved, does not justify the rejection of evidence that is competent, material and relevant.

3. A hypothetical question should not be excluded because it is not framed upon the best evidence; it is proper and should be permitted to be answered if supported by evidence tending to prove the facts therein enumerated.

Cameron & Cameron, for plaintiffs in error.

Brucker, Voegle & Henkel and *Robinson & Hoopes*, contra.

HUGHES, J.

This was an action commonly known as a will contest under the statutes.

The record discloses that there was no evidence offered by the contestant tending to prove a lack of mental capacity to make the will on the part of the testator, nor tending to prove undue influence (there being no other issues suggested throughout the record), except the evidence of two physicians. These two physicians had no personal acquaintance with the testator, but in answer to a hypothetical question, based upon facts that had been testified to with more or less clearness by other witnesses, stated that in the opinion of each the testator had not sufficient mental capacity to make a will.

At the close of the evidence the court, upon the motion of the defendants, directed the jury to return a verdict in favor of the defendants, declaring the paper writing to be the last will and testament of testator.

This was done by the trial court as he then stated, "leaving out the question of the hypothetical question to the two physicians because their answers were based upon statements that were made to them and not upon the facts in the case; they had no personal knowledge or acquaintance with the party," upon the theory that in a will case the trial court is not bound by the scintilla rule, but is required to first weigh the evidence and determine whether or not the contestant has offered sufficient evidence to overcome the *prima facie* case made by the introduction in evidence of the original will and the record of its probate, by the defendants.

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There is to be found authority for this proposition, such as the case of *Gomien v. Weidemier*, 27 C.U.(N.S.), 177, and *Kammann v. Kammann*, 26 C.C.(N.S.), 60, and the cases commented upon in the above named authorities.

In a will contest case the issues are to be first made up and then tried by a jury, and we can see no reason for making an exception of these cases and permitting the court at any stage of the proceedings to weigh the evidence. The contestant has as much right to have the issues of fact determined by the jury in these cases as he has in any other case in which he is entitled to a jury trial.

It is argued that had the verdict of the jury been in favor of the contestant, the court would have been required to set aside the same as against the weight of the evidence, and he therefore was obliged to direct a verdict because of this fact, in conjunction with the fact that the defendants started with a *prima facie* case under the statute, which they claim it was the province of the court to say had not been overcome.

Defendants had, 'tis true, made a *prima facie* case by the introduction of the will and the probate record, yet it was the right of the contestant to have the facts in the case determined by a jury, and when she had offered evidence tending to prove each material fact involved in the issues, it became just as much a question of fact for the jury in this case as in any other case, and there can be no reason why the trial court should be authorized to weigh the evidence to the extent of determining whether or not it was sufficient to overcome this *prima facie* case, and if in his opinion it was not to direct a verdict.

It can as well be said in cases of this kind as in the trial of any other jury case, quoting Justice Ranney:

“Aside from the fact that such a practice involves an assumption of power by the court which the Constitution and the laws have committed to the jury, in the very case supposed, the plaintiff would have good cause to complain of injury. A non-suit puts him out of court, and charges him with the costs; a new trial leaves him in court, and, ordinarily, exacts the costs from the other side. It would also have deprived the plaintiff of the bene-

fit of the statute limiting the power of the court, in granting new trials, to not more than two to the same party." 4 O. S., 628, at 647.

If the rule were otherwise, what is there to prevent the court from weighing all the evidence that has been offered in any will case and passing judgment upon it by saying that it is not sufficient to overcome the *prima facie* case? Why could not the court in any case say that because the witnesses who have testified against the will would profit by setting it aside, are prejudiced and their evidence can not be considered as overcoming this *prima facie* case? Or, why could not the court say that those numerous witnesses, who are but business acquaintances, who have testified to the mental incapacity of a testator, are not to be considered competent to overcome such *prima facie* case, because they lack an intimate daily acquaintance sufficient to pass reliable judgment?

There is no reason suggesting itself to us why a jury trial in a will case is any other than a common law trial by jury. This we believe is recognized by our Supreme Court in the language it has used in the opinion in 44 O. S., page 59, at page 67.

At any rate the statute provides for trial of the issues by a jury, and this means issues of fact; and when it is a question of fact the jury, and not the court, must determine it.

"If this were a case for the jury, under the issues pleaded and the evidence offered, then the plaintiff had the constitutional right to a verdict by the jury." 92 O. S., 387, at 389.

Upon a motion to direct a verdict in these cases as in any other case, the court must review the evidence, concede the truth of every fact which is tended to be proven by the evidence, and when he has found some evidence tending to prove each essential fact, his duty is discharged and it then must be submitted to the jury.

The reasoning of Justice Donahue in 93 O. S., 152, at 155, while not a will case, can be applied to this case with much soundness.

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The only difference in the burden of proof resting upon a contestant in a will case and the burden resting upon an affirmative side in other civil cases is that, in a will case he must furnish evidence sufficient to preponderate not only against the evidence offered for the will, but also to preponderate against that presumption arising from the order of probate and the will itself. When he has offered evidence tending to meet these requirements, there seems no good reason why he should not be entitled to have his case weighed and considered by the jury.

In the case at bar the trial court left out of consideration the testimony of the two doctors, yet by moving to direct a verdict the truth of the fact testified to by them is conceded; that is, that the testator had not the testamentary capacity to make a will. This being conceded true, the paper writing could not be the last will and testament.

It was the province of the jury then to weigh this evidence and to determine whether it was of probative value sufficient to overcome the *prima facie* case and the other evidence in favor of the will. If it had been found sufficient and the court should have then set aside the verdict as against the evidence, it is the right of the contestant to resubmit his case upon the same evidence, and if successful on the second trial to be held secure against a second setting aside on the same ground. The court, therefore, was in error in directing a verdict.

The record discloses other errors, in themselves not of sufficient importance to reverse, to which attention is called.

First. The court rejected evidence of intemperance because no reference was made to such proof in the trial statement. This was error. A party is not required to state, nor is he limited by what he does state as to what the evidence will be. Evidence that is competent, material or relevant, should be admitted whether reference is made thereto in the trial statement or not.

Second. The first hypothetical question was not permitted to be answered because it was not framed upon the *best* evidence, as the court said. This is not a correct rule. A hypothetical question is proper and should be permitted to be answered, if

it is supported by evidence tending to prove the facts therein enumerated. What may be termed the best evidence in a case is not required to be sifted out and embodied in the question.

KINDER, J., and CROW, J., concur.

TITLE TO A BANK DEPOSIT.

Court of Appeals for Cuyahoga County.

IN RE ESTATE OF ELLEN MORGAN.

Decided, January 21, 1918.

Banks and Banking—Purpose of Section 9790-1, is for Protection of Banks—Title to a Deposit Not Determined Thereby—Funds Belonging to Mother But Deposited in Names of Mother and Daughter Jointly—Held to Pass on Death of the Mother to Her Personal Representative.

1. The provisions of Section 9790-1, having reference to bank deposits made in the names of two persons and payable to either of them or the heir of either of them, is for the protection of banks receiving such deposits, and while payment may be made under the authority of this statute to the survivor of either, such payment does not determine the question of title to the fund.
2. The direction given by a mother to the bank in which she was depositing a fund, that it should be paid to herself or her daughter L or the survivor of either of them, was not a gift *inter vivos* to the daughter, nor in any way a testamentary disposition of the fund, and upon the death of the mother title to the fund passed, not to the daughter, but to the personal representative of the mother.

W. J. Hamilton, for plaintiff in error.

E. J. Thobaben, contra.

CARPENTER, J.

This case is here on error from the common pleas court.

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From the statement of facts, it appears that Ellen Morgan, having a deposit of \$1,038.88 with the Society for Savings, went with her daughter, Lillie Morgan Fetzer, to Society for Savings and said to the officer in charge that she wanted her daughter to have this money, and that if they would agree to pay to said daughter whatever might remain in said account at her (the mother's) death, provided she should die first, that she (Ellen Morgan) would leave such account with the bank subject to the right of withdrawal by either daughter or herself until the death of either herself or said Lillie Morgan. The bank having assented to this proposition, said Ellen Morgan caused the name of her said daughter to be added to her own on said bank book, to which was added the words, "Mrs. Morgan or Lillie Fetzer, payable to either or the survivor." The record of the account, as kept by the bank, used this language. The mother placed the book in a safe deposit box to which the mother alone had access, and it was found there at the time of her death.

The common pleas court, on appeal from the judgment of the probate court, rendered judgment against the plaintiff, Lillie M. Fetzer, holding that the money in said deposit belonged to the estate of said Ellen Morgan. The case is here to reverse this judgment. We find no error in this case to the prejudice of the plaintiff.

Section 9790-1, General Code, provides that where a deposit has been made in any bank, savings bank, etc., in the names of two persons, payable to either, or to either or the survivor, such deposit or any part thereof or any interest or dividend thereon may be paid to either of said persons, whether the other be living or not, and the receipt of the person so paid shall be a valid and sufficient release and discharge to the bank for any payment so made.

It is evident that this statute was enacted solely for the benefit of the bank, and not for the depositor. It will be observed that it relates to the payment only, and protects the bank from further obligation and avoids suits that would otherwise be likely brought against it. It would scarcely be claimed by any

one that this statute related in any manner to the title to moneys on deposit at the death of the depositor. It is claimed, however, that inasmuch as the bank agreed to pay to either said Ellen or her daughter Lilly, as above set forth, on the consideration that the deposit would be allowed to remain subject to withdrawal by either, that thereby the bank became obligated under the doctrine that an agreement made on a valid consideration by one person with another to pay money to a third can be enforced by the latter in his own name, and therefore the title to this property at the death of Ellen passed or devolved by operation of law to Lilly. The statement itself shows the absurdity of the claim. The fallacy is discoverable in that it assumes payment creates title. The bank held the money, the title of which was in the mother, and the agreement of the bank to pay, even on consideration, could not change the title. True, if Lilly had drawn out any or all of this money and had spent it, which she had full right to do, there would be nothing left to which title could be asserted. But as to the title to the money remaining in the bank during the life of the mother there can be no question, for it is conceded that Lilly had not contributed to the fund; being the mother's at the time of her death, it would descend as a part of her estate unless the transaction at the bank created a right of title at the death of Ellen. It is not claimed that the transaction amounted to a testamentary disposition. As between Lilly and her mother there passed no consideration. It could not be said that it was a gift *inter vivos*, because there was not an irrevocable delivery; in fact there was no delivery. The donor retained the right to its use. And there is no claim that it was a gift *causa mortis*, or a testamentary disposition.

In our opinion the plaintiff utterly fails to make her case, and we therefore affirm the judgment.

GRANT, J., and LIEGHLEY, J., concur.

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ALIMONY AWARDED TO A HELPLESS HUSBAND.

Court of Appeals for Lucas County.

MARY A. ALBERT v. GEORGE W. ALBERT.

Decided, April 21, 1916.

Husband and Wife—Blind Husband Deserted by Wife—His Petition for Divorce Denied—But Division Ordered of Property Acquired and Placed in Wife's Name During Coverture.

1. Where a husband files a petition for divorce and alimony, and upon trial the court refuses to grant a divorce, alimony may be awarded to the husband.
2. Whether a husband can begin and maintain an action for alimony alone—*Quære.*
3. Under Sections 7995 and 7997, General Code, a husband, unable to support himself, may compel his support by the wife regardless of any right to maintain an action for alimony alone.

Marshall & Fraser, for plaintiff in error.

W. W. Campbell and *B. F. James*, contra.

CHITTENDEN, J.

Error to the court of common pleas.

This is a proceeding in error from a decree of the common pleas court awarding alimony to the defendant in error. The case was tried upon the amended petition and an amendment and supplement to the amended petition of the plaintiff, George W. Albert, and the answer thereto of the defendant, Mary A. Albert. The prayer of the plaintiff was for divorce and alimony. The court found from the pleadings and evidence that certain property described in the journal entry was acquired by the parties during coverture and paid for from the earnings of the plaintiff, and that title was taken in the name of the defendant. The court further found that the plaintiff was not entitled to a divorce and his prayer for that relief was denied. It was further found that the parties are living separate and apart; that the plaintiff is totally blind; and that the defendant has refused

to live with or care for the plaintiff. The entry thereupon recites that the plaintiff is entitled to alimony from the said defendant and that the defendant should convey to the plaintiff as and for alimony an undivided one-half of all the real estate. The decree further provides that the defendant shall execute a conveyance to the plaintiff for such undivided one-half interest and that upon her failure so to do the decree shall operate as such conveyance. To all of which findings and decree the defendant excepted. No bill of exceptions is filed in this court, and the only question submitted for decision may be stated as follows:

Where a husband files a petition for divorce and alimony, and upon trial the court refuses to grant a divorce, can a decree for alimony be awarded to the husband?

This requires an examination of the statutes relating to that subject. The decree is said to be based upon the provisions of Section 11992, General Code, which reads as follows:

“When it appears to the court that the husband is the owner of little or no property and the wife is the owner of lands or personal estate, or both, the court may adjudge to the husband such share of her real or personal property, or both, or may decree to him such sum of money out of her estate, payable in gross or by installments, as it deems just, having due regard to all the circumstances of the parties.”

This section by its terms seems to be ample authority for the granting of the relief given in this case, but plaintiff in error contends that it is not applicable to a situation such as is disclosed by the record. Attention is called to the fact that the section just cited was a part of Section 5699 of the Revised Statutes, which section, by the adoption of the General Code, was divided into three sections and numbered 11990, 11991 and 11992. That part of the section of the Revised Statutes now found in Section 11992 was an amendment to Section 5699, Revised Statutes, passed by the General Assembly May 19, 1894 (91 O. L., 348). Prior to this amendment there was no provision for the granting of alimony to a husband when a divorce was granted to the wife upon the aggression of the husband.

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Reliance is had upon the case of *DeWitt v. DeWitt*, 67 O. S., 340, and attention is called to the language of the court in the decision of that case, found on page 353, a portion of which we quote:

"The amendment, if taken unqualifiedly, is contradictory to the earlier part of the section, and if the defendant desired to avail himself of its provisions, he should have made a case justifying its application. The purpose of the amendment probably is to place the erring husband in a position respecting property akin to that given an erring wife by the succeeding section, but the language is less general and noticeably more guarded."

In that case a divorce had been granted to the plaintiff upon the aggression of the husband, so that the exact question now under consideration was not before the court. It appears from an examination of that case that the husband was possessed of considerable means at the time of the decree, and we have no doubt that what the court meant by the language "and if the defendant desired to avail himself of its provisions, he should have made a case justifying its application," was that he had not shown to the trial court that he was the owner of little or no property and that his wife was the owner of lands or personal estate. This case is in no way decisive of the one at bar.

The doctrine of alimony, as stated in 14 Cyc., 743, is based upon the common law obligation of the husband to support his wife, which is not removed by divorce obtained by her for his misconduct. As stated by Judge Davis in *Fickel v. Granger*, 83 O. S., 101, on page 106:

"Alimony is an allowance for support, which is made upon considerations of equity and public policy. * * * It is based upon the obligation growing out of the marriage relation, that the husband must support his wife, an obligation which continues even after a legal separation without her fault."

Many other cases might be cited showing that the courts have ever recognized that the doctrine of alimony rests upon either the common law or the statutory obligation of the husband to support the wife. It is unnecessary to review the history of the

legislation of this state whereby the rights of married women have been gradually enlarged until, for some years, they have been the same as the property rights of a *feme sole*. After having established this status, it was further provided by an act of the General Assembly, Section 7995, General Code, "Husband and wife contract toward each other obligations of mutual respect, fidelity and support." Section 7997, General Code, provides that, "The husband must support himself, his wife and his minor children out of his property or by his labor. If he is unable to do so the wife must assist him so far as she is able." By the first of the above cited sections husband and wife mutually contract for each other's support. By the latter section the duty of support is place primarily upon the husband, but with the obligation upon the wife to assume her contractual burden in case of his disability. In view of their legal status as thus stated, every reason exists why the right of the husband to the support of his wife, under the conditions named in the statute, should be enforced by legal proceedings. We do not have before us the question as to whether or not a husband can begin and maintain an action for alimony alone, as no such case is presented by the pleadings, for in this case the action, as has been stated, was for divorce and alimony.

If we examine Section 5699, Revised Statutes, as it is insisted we must do in order to correctly construe Section 11992, General Code, we find that the amendment begins with these words, "But in any case" when it appears to the court that the husband is the owner of but little or no property, etc. It is significant that the amendment did not read, "But in any case when a divorce is granted." We think it an entirely reasonable construction of the section of the Revised Statutes that it was intended by the Legislature to empower the court, in any case—that is, any case in which a divorce was sought—to grant alimony to the husband if the facts and circumstances required it. We find that when it came to codifying the laws of Ohio this section was divided into three separate sections, and that the Legislature adopted the code with these three sections standing as independent sections. We are of opinion that one of the purposes in doing this

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was to make the intent of the Legislature with reference to the granting of alimony to a husband more clear and definite. The General Code is to be construed in the form in which it is now found. While it is often proper and perhaps necessary to trace the history of legislation and to examine the original form of a law to ascertain the true intent and meaning and to properly construe it, yet the form of the statute as it existed prior to the codification is not necessarily controlling. *State v. Toney*, 81 O. S., 130. We quote from the language of Judge Spear, beginning on page 139, as follows:

“Nor is it accurate to treat the change in the statute as the work of the codifying commission. Their codification was submitted to, considered by, and adopted by the law making body of the state, the General Assembly. It should not receive any less respect because the change may have been recommended by three commissioners learned in the law instead of being proposed in the first instance by some single member of the General Assembly, and after all is said, the enactment receives its vigor and force as law by reason of its enactment by the General Assembly, no matter from what source the inspiration came.”

We are unable to hold that the operation of Section 11992, General Code, is limited by Section 11990, and that a husband can not be awarded alimony unless a divorce is granted to the wife because of his aggression. If the legal duty devolves upon the wife to support the husband when she is able to do so, and he is disabled, and if that right can be enforced upon the granting to her of a decree for divorce, it would seem by every rule of logic and common sense that she should certainly be required to furnish such support while the marriage is still in force.

We are strengthened in our view of the plain intent of the Legislature to provide for the granting of alimony to a husband, by Section 11992, General Code, by a consideration of Section 11994, which provides, in substance, that the court may grant temporary alimony to either the husband or wife “during the pendency of the action for divorce, or alimony alone.”

An examination of the legislation to which attention has been called plainly shows that the Legislature attempted to give a

husband and a wife equal property rights, and to impose upon them mutual obligations, and to furnish means for the enforcing of these obligations, and we think that the court had the power to make the decree to which error is prosecuted.

Aside from all questions of the power of the court to grant the relief that it did, as alimony and by virtue of the statutory enactments relating to that subject, a majority of the court are of opinion that, with the record as we find it, that is to say, upon an examination of the pleadings and the finding and decree of the court, there being no bill of exceptions presenting the evidence, the decree may be and should be sustained upon an additional ground. Sections 7995 and 7997 quoted above impose the positive legal duty upon the wife to support or assist in the support of the husband when he is unable to support himself. The Circuit Court of Pike County, in *Hickle v. Hickle*, 6 C. C., 490, held that under these statutes a husband might compel his support by the wife regardless of any right to maintain an action for alimony alone. The court made an exhaustive examination of the cases bearing upon the subject, and entered a decree in favor of the husband, requiring the wife to support him. The decree herein was evidently not based upon the sections quoted above, for the decree in this case is that the plaintiff is entitled to alimony and the defendant is ordered to convey to the plaintiff an undivided one-half interest as and for alimony. In view of the fact that the petition contained all of the allegations necessary to present a case compelling the wife to furnish support to her husband, we deem it immaterial that the trial court denominated the award as alimony. The character of the allowance is not changed by the fact that in the decree it is designated as alimony. *Kelso v. Lovejoy et al*, 9 C.C.(N.S.), 539, affirmed by Supreme Court, without report, 76 O. S., 598; *Webster v. Miller*, 18 C.C.(N.S.), 272, affirmed, without opinion, 83 O. S., 473.

The decree is in this court attended by every presumption of its regularity and correctness, and the burden is upon the plaintiff in error to show prejudicial error. This she has failed to do.

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The court, while not in entire accord on grounds for affirmance, is unanimous in its conclusion that the judgment should be affirmed.

The decree will be affirmed.

RICHARDS, J., and KINKADE, J., concur.

**RESTRICTION IN THE PRIVILEGES OF A THEATER
ON ACCOUNT OF COLOR.**

Court of Appeals for Jefferson County.

MALINDA GUY V. THE TRI-STATE AMUSEMENT COMPANY.

Decided, December Term, 1917.

Damages—Infringement of Civil Rights—Color or Race Discrimination—Place of Public Amusement—Proprietor Liable Under Section 12941, General Code, When.

The proprietor of a picture show who refuses another the right or privilege of sitting in a certain or particular part of the theater or auditorium during the performance or display of pictures, and such refusal is on account of race or color and for no other reason, is liable to be penalized under Section 12941, General Code.

Edward McKinley and E. DeWitt Erskine, for plaintiff in error.

Harry L. May and W. C. Brown, contra.

FARR, J.

This is a proceeding in error brought to reverse a judgment of the court of common pleas of this county, and the parties sustain the same relation here as in the court below. On the 17th day of December, A. D. 1916, Malinda Guy, the plaintiff in error, filed her petition in the court below seeking to recover from the Tri-State Amusement Company for an alleged violation of Sections 12940 and 12941 of the General Code, which

provide that there shall be no denial of privileges at inns and certain other places to a citizen, by reason of color, except for reasons applicable alike to all citizens regardless of color.

The plaintiff alleges in her petition that on or about the 1st day of August, A. D. 1916, she went into the Olympic Theater in the city of Steubenville in company with one Isaac E. Stady, a colored man, and a theological student of Wilberforce University, she herself being a colored woman. She further alleges in her petition that she purchased two tickets at the price of ten cents each; that she surrendered the tickets to the person at the entrance, passed into the theater, and was seated in the fifth row, the second seat in, in the center tier of seats; that the usher approached her and requested her to abandon her seat and be seated on the right-hand side or in the right-hand tier of seats in said theater.

It is further alleged in the petition that she left said theater, surrendering her tickets at the window where she had received them. To this petition an answer is filed by the defendant company, the defendant in error here, stating or admitting that it had rules and regulations providing for the conduct of people within said theater, and that it was the duty of its usher or ushers to show people to their seats in said theater, but denying that there had been any discrimination against Malinda Guy, or Isaac E. Stady by reason of their color. The cause came on to be heard and was tried to a jury. There was a verdict for the defendant and judgment upon the verdict, to which error is prosecuted in this court.

As above stated the action below is predicated on Sections 12940 and 12941 of the General Code. The former section reads as follows:

“Whoever, being the proprietor or his employee, keeper or manager of an inn, restaurant, eating house, barber-shop, public conveyance by land or water, theater or other place of public accommodation and amusement denies to a citizen, except for reasons applicable alike to all citizens and regardless of color or race, the full enjoyment of the accommodations, advantages, facilities or privileges thereof, or being a person who aids or in-

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cites the denial thereof, shall be fined not less than fifty dollars nor more than five hundred dollars or imprisoned not less than thirty days nor more than ninety days, or both."

And the latter section provides as follows:

"Whoever violates the next preceding section shall also pay not less than fifty dollars nor more than five hundred dollars to the person aggrieved thereby, to be recovered in any court of competent jurisdiction in the county where such offense was committed."

The petition below sought to recover under and by favor of this latter section. Mrs. Guy says that she purchased said tickets for admission on said evening of August 1st; entered said theater, surrendered the tickets, went down five rows from the rear of the theater, and sat down in the second seat in from the aisle in the center section of seats; that soon after she had taken her seat she looked back and saw her companion, Mr. Stady, conversing with the usher, Mr. Russell, who came to her a few minutes later and asked her in a genteel manner to take a seat on the other side, designating the right-hand side of the theater; that she asked the usher why, and he said again, "Will you kindly take a seat on the right-hand side of the theater?" She again interrogated him to know why, and he said, "On account of your color." This testimony is substantially corroborated by Mr. Stady. He says that he had a conversation with the same usher and was going to sit with his companion, Mrs. Guy, when the usher forbade him to do so, and he then said he had gone to the theater in company with her and he wished to sit with her. The usher said that he could not do so in the center section, and that he must be seated on the right-hand side of the theater. Mrs. Guy then returned to where Mr. Stady was, and the two left the theater together, but later returned in company with a friend who had some conversation with the usher with reference to the matter, and it is not denied that the usher stated that he had invited the two colored persons to be seated on the right-hand side of the theater on account of their color.

If there were any denial of that fact the record settles it once and for all at page 36, in the examination of Mr. Russell, who was the usher on that occasion. He says: "I said, kindly remove to the other side of the house. She said, Why? I said, On account of your color." So that Mr. Russell admits that the request for the removal to the right side of the auditorium was because they were colored persons.

It is urged in argument that the Tri-State Amusement Company, operating this theater, had the right to make such reasonable rules and regulations as they saw fit to make with reference to the seating of persons in their theater, and that they were permitted to make a rule authorizing or requiring their usher to show people to seats within their theater. There can be no question but what such rules would be permissible under the law of this state. However, it must be noted by said Section 12940 that it is provided that all citizens, regardless of color or race, shall have the full enjoyment of the accommodations, advantages, facilities or privileges thereof, that is, at inns, places of amusement and other places enumerated in said statute.

The matter of these people being seated within the theater was a privilege, and if this section of the General Code is rightly understood, it is not simply a privilege of seeing the pictures or hearing the music or meeting and greeting their friends, but all patrons are entitled to fully enjoy *alike* all the privileges accorded to patrons within the theater.

It might be contended here that these persons had just as good an opportunity to see the pictures or vaudeville performance, if such there may have been, seated on the right-hand side as if they were seated in the center section. However, if these colored people were required to be so seated they would only be allowed partial enjoyment of the privileges of that theater, because white persons were permitted to occupy the center section as well as the other parts of said auditorium; that is to say, they could enjoy the privilege of seeing the pictures, they could enjoy the privilege of hearing the music, they might enjoy the privilege of greeting their friends and acquaintances within the building, yet at the same

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time they were certainly denied some of the privileges that were given to persons of the white race, because the latter might enjoy the additional privilege of the center section of seats.

For instance, if two persons of the white race had purchased tickets for a like consideration and seated themselves in the center section of seats, under the rules and regulations of this theater they would not have been called upon to have taken seats on the left-hand side or right-hand side. Therefore, these colored people were directed to sit upon the right-hand side of the theater, which was a place set apart for their use and they were not permitted to sit in other parts of said auditorium. It is urged, and with considerable force in argument, that theater managers have a right to make such reasonable rules and regulations for the conduct and control of people within their theater as may seem to them necessary; however, the provisions of said Section 12940 must be kept in mind, wherein it is provided that privileges shall be extended *alike* to persons of *all* races. Therefore, no rules or regulations can be made in violation of or that would contravene this section of the statute.

Somewhat helpful is a well considered case from this immediate jurisdiction; it is *The Youngstown Park & Falls Street Railway Co. v. Tokus*, 4 Ohio Appellate Reports, 276; 22 C.C. (N.S.), 417. This was a case where two young colored persons, Tokus and his sister, attended a Sunday school picnic; having purchased tickets they went upon the floor of the dancing pavilion, and after having been there some time they were bidden by the person in charge of the platform to leave, which they did.

Suit was brought, and in passing upon the case it is held:

"A proprietor of a public dancing pavilion, who ejects another therefrom after he had been admitted thereon, on account of his color or race and for no other reason, is liable to pay a penalty, under Section 12941 of the General Code."

The very section upon which suit is predicated here.

Tokus and his sister were well behaved and orderly colored persons. It was hinted and even suggested that by reason of greater grace of movement on the dancing floor than some of the other dancers, jealousy of persons of the white race was excited, and for that reason their dismissal was brought about.

What are the circumstances in this case? Here was this young theological student and this lady, both persons of good character. Was there any reason why they should be discriminated against? Is it not true that under the provisions of the foregoing sections of the statute they *were* discriminated against? To hold otherwise would be to render these sections as sounding brass. Said sections were passed by our Legislature, not for any imaginary, but a real purpose. A little more consideration, a little more willing obedience to these laws on the part of the people of the white race might render some of the problems which have arisen a little less perplexing.

The charge of the court below was clear, concise and explicit. The jury certainly did not comprehend it. The record clearly discloses a violation of these sections of the statute; that the plaintiff in error here was entitled to recover under said Section 12941 there can be no question.

It follows, therefore, that by reason of the jury failing to comprehend the instructions of the court, that the case must be reversed and remanded for a new trial, which is done accordingly.

POLLOCK, J., and METCALFE, J., concur.

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Darke County.

**IMPRISONMENT AS A PENALTY FOR FAILURE TO
PAY FINE AND COSTS.**

Court of Appeals for Darke County.

PERCY WITTERS v. LYNN BROWNE, SHERIFF OF DARKE COUNTY.

Decided, January 7, 1918.

Sentence—Suspension of—Remedy in Case of Refusal to Pass on Motion for a New Trial—Delay in Enforcing Sentence Not a Bar to Its Execution, When.

1. The effect of the overruling of an application for a *nunc pro tunc* entry suspending sentence is to adjudicate conclusively that no order of suspension was ever made. The remedy is a proceeding in error, or in the event of the court refusing to pass on the motion for a new trial the remedy is to compel action by a writ of mandamus.
2. Where no fixed term of imprisonment is named, and it is provided only as a means of enforcing collection of a fine and costs, delay in its enforcement does not prevent the issuing of a writ of execution.

John Maher, for plaintiff in error.

George F. Crawford, contra.

KUNKLE, J.

This action was brought by plaintiff in error to enjoin defendant in error, as sheriff of Darke county, Ohio, from proceeding under an execution issued by the Probate Court of Darke County in a criminal action wherein plaintiff in error was adjudged to pay a certain fine and costs.

Plaintiff in error claims that the probate court, at the time the sentence was imposed, ordered the same suspended but neglected to enter the same of record.

It further appears from the petition that a motion to enter such order of suspension *nunc pro tunc* was overruled and that a motion for a new trial was filed within three days after such refusal and is still pending.

A demurrer was filed and sustained to the petition, and the plaintiff not desiring to amend a final judgment was entered dismissing the petition. From said judgment plaintiff in error prosecutes error to this court.

The only question for consideration relates to the sufficiency of the petition.

Two questions were presented:

1. As to the alleged suspension of the sentence.
2. As to the delay in the enforcement of the sentence.

As to the first proposition, it is conceded that an application was made to the probate court to enter such order of suspension *nunc pro tunc*, and that such application was refused. The effect of such refusal was to adjudicate conclusively that no such order of suspension was made.

If such adjudication was erroneous, the remedy of plaintiff in error was to prosecute error therefrom. Such adjudication can not be impeached collaterally. The filing of the motion for a new trial and the failure of the court to pass upon the same does not operate to annul the finding and judgment upon the application for a *nunc pro tunc* order.

Plaintiff's remedy in case the probate court refused to pass upon such motion for a new trial was to compel action thereon by a writ of mandamus.

We have carefully examined the authorities presented as to the second proposition and are of opinion that in Ohio the mere failure to issue an execution upon the judgment in question, under the circumstances set forth in the petition, is not a bar to an execution issued thereon and now in the hands of defendant in error as sheriff.

Considerable stress is laid upon the decision of Judge Houck of the Fifth District in a recent decision. We have carefully considered this decision and are of opinion that the case at bar is clearly distinguishable from the one decided by the Fifth Appellate District.

The case decided by Judge Houck involved a sentence of imprisonment for a fixed term, and that court merely held that under Section 13714, General Code, the trial court could not revoke

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a suspended sentence and proceed to execute the sentence after the expiration of the longest period for which the defendant might have been sentenced. The case at bar contains no fixed sentence of imprisonment, but merely provides for imprisonment as a means of enforcing the collection of the fine and costs, and there is no special statute limiting the time for executing the sentence under consideration.

The demurrer having been properly sustained, the judgment should be affirmed.

Execution of sentence may be suspended for thirty days if counsel desire to secure the judgment of the Supreme Court upon this case.

ALLREAD, J., and FERNEDING, J., concur.

MAINTENANCE OF AN OVERHANGING CORNICE ENJOINED.

Court of Appeals for Shelby County.

HENRY F. YOUNG ET AL V. IGNATIUS HENRY THEDIECK.

Decided, February 13, 1918.

Overhanging Cornice—Party Wall—Easement—Mandatory Injunction Against Maintenance of Cornice—Property Rights Above the Same as Those on the Surface.

1. The construction and maintenance by one lot owner, of a cornice extending beyond the party wall over the lot of an adjoining proprietor without his acquiescence or consent is a violation of the latter's property rights.
2. The establishment of a party wall does not by implication give one proprietor the right to extend his structure over the adjoining lot.
3. The fact that the overhanging cornice is constructed above the present building on the adjoining lot and does not affect the present use thereof is no defense.
4. Mandatory injunction is an appropriate remedy to enforce the property rights so violated.

D. F. Mills, for plaintiff.

Hess & Hess, contra.

ALLREAD, J.

This action was brought to obtain a mandatory injunction to compel the removal of an overhanging cornice.

The pleadings and agreed statement of facts show that in the construction of a four-story building, the defendant extended the cornice some two or three feet over the premises of plaintiff. It appears that the cornice is above the plaintiff's building and does not interfere with the present use of the plaintiff's property.

There is a party wall between the buildings of the respective parties which has been extended upward to accommodate and form part of the defendant's structure.

The question involved is as to the defendant's right to maintain the overhanging cornice.

We are of opinion that the defendant's easement in the party wall does not extend beyond the wall itself, and that the construction and maintenance of the cornice extending over plaintiff's premises is a violation of his property rights. *Harrington v. McCarthy*, 169 Mass., 492; *Nash v. Kemp*, 49 Howard Pr., 523, 12 Hun., 592; *Marion v. Johnson*, 23 La. Ann., 593.

We have examined the cases cited by counsel for defendant involving windows, chimneys and upward extensions of party walls. In none of those cases do we find any overhanging structures extending beyond the partition wall. We think all the cases may be distinguished upon that ground.

We are also of the opinion that the fact that the cornice does not now interfere with plaintiff's use of their property does not affect the question. The plaintiff's property right extends upward indefinitely and those rights may be enforced against invasion to the same extent as surface rights.

A mandatory injunction will, therefore, be issued requiring the defendant to remove the cornice and overhanging structure within six months and defendant will be required to pay costs.

Decree accordingly.

KUNKLE, J., and FERNEDING, J., concur.

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Franklin County.

**RAILWAYS OUSTED FROM CONTROL OF COMPETING
LINES.**

Court of Appeals for Franklin County.

STATE OF OHIO, ON RELATION OF TIMOTHY S. HOGAN, ATTORNEY-
GENERAL, V. THE HOCKING VALLEY RAILWAY COMPANY ET AL.

Decided, August 22, 1917.

*Restraint of Trade—Brought About Through Railway Control—Stock
Ownership Permissible in Kindred But not in Competing Lines—
Railways Ousted from Control Provided for Under the Agreement
of 1910.*

1. The Zanesville & Western Railway is a feeder and therefore a kindred rather than a competing line of the Toledo & Ohio Central, and no legal impediment exists to the holding of its stock by the Toledo & Ohio Central or the Lake Shore & Michigan Southern. Neither is there objection to the holding of Toledo & Ohio Central stock by the Lake Shore & Michigan Southern or to the holding of Hocking Valley stock by the Chesapeake & Ohio.
2. The agreement of March, 1910, providing for the acquisition by the Lake Shore and Chesapeake & Ohio of stocks of certain coal companies, and for the exclusive control of the Toledo & Ohio Central by the Lake Shore, and the Hocking Valley by the Chesapeake & Ohio, with a trusteeship over the Kanawha & Michigan, with a tonnage agreement and arrangements for interchange of transportation facilities, was inconsistent with the decree of the Circuit Court of Franklin County of January, 1910; and notwithstanding action has been taken by the Federal Court requiring disposition of the stocks so acquired and surrender of control in so far as it affects interstate commerce, this court holds that the state is entitled to the benefit of additional relief with respect to intrastate business, and grants a decree of ouster with reference to control of coal mining stocks and the right to continue in the enjoyment of tonnage agreements and the interchange of transportation facilities complained of.
3. The New York Central as the successor to the Lake Shore in control of the Toledo & Ohio Central is properly a party to the decree, but so much of the supplemental petition as is involved under the averments as to competition between the New York Central and the Toledo & Ohio Central is dismissed without prejudice.

Joseph McGhee, Attorney-General of Ohio; *Frank Davis, Jr.*, special counsel, *E. C. Morton*, *M. A. Daugherty*, *Webber*, *McCoy & Jones* and *R. J. O'Dell*, of counsel for state.

Lawrence Maxwell, *A. C. Reavitt* and *Wilson & Rector*, for the Chesapeake & Ohio and Hocking Valley railway companies.

Doyle, *Lewis*, *Lewis & Emery*, for the New York Central, the Lake Shore & Michigan Southern, the Toledo & Ohio Central, the Zanesville & Western and the Kanawha & Michigan railway companies.

• BY THE COURT (Kunkle, Allread and Ferneding, JJ., concurring).

The state charges the defendants with a combination and conspiracy in restraint of trade in respect to intrastate traffic.

The alleged combination attacked by the state in the present action originated in the Morgan plan of reorganization of the Hocking Valley Railway Company which contemplated and subsequently embraced control of the Toledo & Ohio Central, the Kanawha & Michigan, and the Zanesville & Western railway companies. These companies were largely engaged in the transportation of bituminous coal from the Ohio and West Virginia coal fields to the cities and markets of Ohio and to the Great Lakes.

In the process of the financial development of this combination, there was acquired a controlling stock interest in certain coal mining companies operating the Ohio and West Virginia districts, and the stock of the Hocking Valley Company (which was then the holding company) fell into the hands of what is called the Trunk Line Syndicate, composed of the five trunk lines controlling the transportation of coal from the entire Appalachian mining district into the markets of the middle west.

At this juncture, the state filed a petition in *quo warranto* in the Circuit Court of Franklin County, which resulted in a judgment entered January 18, 1910 (12 C.C.[N.S.], 49 and 145), ordering a dissolution of the Morgan combination between the Hocking Valley on the one hand and the Toledo & Ohio Central, the Kanawha & Michigan and the Zanesville & Western upon the

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other; and also ordering a dissolution of the stock-holding connection between the Hocking Valley Railway Company and the various coal mining companies controlling mines along the line of said railway in the Hocking Valley district in the state of Ohio.

Following the final judgment of the Circuit Court of Franklin County, there was executed what is known as the March, 1910, agreement between the Lake Shore and Chesapeake & Ohio railway companies and acquiesced in by the other railroads forming the Trunk Line Syndicate.

Without going into unnecessary detail, this contract provided for the acquisition by the Lake Shore and Chesapeake & Ohio companies of the stock held by the five companies composing the Trunk Line Syndicate. It also provided for the transfer of the Hocking Valley stock exclusively to the Chesapeake & Ohio and of the Toledo & Ohio Central stock exclusively to the Lake Shore Company. The contract further provided for the transfer of a portion of the stock of the Kanawha & Michigan to the Chesapeake & Ohio and for the trusteeing of the majority of the controlling interest in the Kanawha & Michigan Company for the joint benefit of the Lake Shore and the Chesapeake & Ohio companies.

By this plan, the Hocking Valley Company was, through stock ownership, practically acquired by the Chesapeake & Ohio Company and by similar means the Lake Shore Company practically acquired the Toledo & Ohio Central and the Zanesville & Western; while the Kanawha & Michigan, which paralleled the Chesapeake & Ohio in West Virginia and the Hocking Valley in Ohio, and connected with both the Toledo & Ohio Central and the Hocking Valley, was made subject to joint control by the Chesapeake & Ohio and the Lake Shore companies. This contract provided for the disposition and trusteeing of the stocks in the coal companies which the Hocking Valley Railroad Company had been ordered to dispose of by the decree of the Franklin county circuit court.

The contract contained a provision for the joint use of the western division of the Toledo & Ohio Central and of the Hock-

ing Valley main line for the transportation of coal cars at the option of either company.

There was a further provision for an arrangement for the distribution of the business of the coal companies whose bonds had been guaranteed by the Toledo & Ohio Central and the Hocking Valley Railway Company, to protect the railway companies upon such guaranty. There was evidently an arrangement for an equal division between the Hocking Valley and the T. & O. C. of the tonnage originating on the K. & M.

Following the March, 1910, agreement and the re-organization and operation of the railway and coal companies thereunder, this action was brought.

Subsequent to the bringing of this action, the United States Government brought an action in the United States Court at Cincinnati to enjoin the various railway companies from carrying out the March, 1910, agreement upon the ground that the same and the operation of the railroad companies thereunder was in violation of the federal anti-trust act. This action was finally decided in favor of the Government, and the defendants were ordered to dispose of their interest in the said coal companies, and the Chesapeake & Ohio was ordered to dispose of its interest in the Kanawha & Michigan Railway Company. This order has been carried out to the approval of the United States Court.

At the instance of the Attorney-General of Ohio, who appeared as *amicus curiae*, the United States Court reserved the question of the corporate power of certain of the railroad companies to hold stock in the other railroad corporations.

The railroad now owned and operated by the Zanesville & Western was probably intended by the original promoters to be an independent competing company for the transportation of bituminous coal. But as now existing, its railroad extends only from Thurston, a small village on the Toledo & Ohio Central, into the coal mining district, and does not reach the coal markets either directly or by any connections independent of the Toledo & Ohio Central.

We have reached the conclusion that the Zanesville & West-

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ern is a feeder rather than a competitor of the Toledo & Ohio Central and, therefore, that there is no legal impediment to the right of the Toledo & Ohio Central or the Lake Shore & Michigan Southern to hold the capital stock of the Zanesville & Western.

The New York Central Railroad Company, the successor by consolidation, of the Lake Shore Company, was brought in by a supplemental petition charging, among other things, that the New York Central Company was a competitor of the Toledo & Ohio Central Railroad Company.

The question of the right of one railroad company to acquire and hold the stock of another railroad company under Sections 8683 and 8784 of the General Code is now settled by the recent decision of our Supreme Court in the case of *Pollitz v. the Public Utilities Commission of Ohio*, 96 Ohio State, page —.

The only condition, therefore, affecting the right of the holding company to acquire the stock of other railroad companies is that the two companies are kindred and not competing.

We think the evidence shows that the Lake Shore Company and the Toledo & Ohio Central Company were connected so as to permit the passage of trains from one railroad to the other. The Chesapeake & Ohio was not, at the time this action was brought, or the case tried, physically connected with the Hocking Valley, but we think that makes no difference in view of the decision in the Pollitz case. We find, as a fact, that the Hocking Valley Railway Company and the Chesapeake & Ohio Railway Company were not competitors for intrastate business. The United States Court held, by necessary inference if not directly, that those companies were not competitors for interstate business and the action of the United States Court is the last word upon the subject of interstate business. We, therefore, follow the action of the United States Court in respect to interstate commerce, and find no legal impediment to the Chesapeake & Ohio Company holding the stock of the Hocking Valley Company, nor do we find that the acquisition and holding of the stock of the Toledo & Ohio Central Railroad Company by the Lake Shore Company was illegal.

The state contends, and we think correctly, that the March, 1910, agreement and the operation of the railroad companies thereunder, down to the time when the relief granted by the United States District Court was put into effect, was not a compliance with the order of the Circuit Court of Franklin County, but amounted to a continuance of the unlawful combination previously existing.

The March, 1910, agreement and the operation of the railroad companies thereunder did not terminate the railroad ownership of the stock in the coal mining companies nor the guaranty of bonds of such companies and the consequent control over the business of such companies. The provision of the March, 1910, agreement for the joint control of the Kanawha & Michigan Railroad Company, which was a competing company with both the Chesapeake & Ohio and the Hocking Valley, and the tonnage arrangement with reference to shipments arising thereon, together with the optional exchange of transportation facilities between the Hocking Valley Company and the Toledo & Ohio Central Company as to its western division, was inconsistent with the complete divorcement of the Chesapeake & Ohio and the Hocking Valley and the Toledo & Ohio Central and the Kanawha & Michigan as competing systems of transportation.

It would, therefore, follow that the combination following the March, 1910, agreement, and in existence at the time the present action in *quo warranto* was brought, was illegal and inconsistent with the decree of the Franklin county circuit court.

It is contended, however, that since the judgment of the United States District Court, and the disposition of the coal company and railway stocks under the approval of said court, this case becomes a moot case and that no order can be made or relief granted.

The case of *United States v. Hamburg-American Company*, 239 U. S., 466, is cited.

We think, upon a consideration of the authorities, that the rule that a court should not decide a moot question does not apply to the present case.

First. Because the question is not entirely moot. This court finding it proper to grant additional relief.

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Second. Because the subject of the present action involves intrastate traffic which was not involved in the federal action; and

Third. Because the state should be entitled to the benefit of the judgment as to intrastate traffic over which it has exclusive control.

The judgment of the United States District Court does not assume to control intrastate traffic, and whether the defendants would observe the regulations of the United States District Court as to intrastate traffic depends upon their volition and not upon the force and effect of the order of the United States Court. *State v. Cox*, 87 O. S., 335. (See opinion of Donahue, J.)

It is true that the stocks of the coal companies and the Kanawha & Michigan Railroad Company have been actually disposed of under the supervision of the United States District Court, but the state is entitled to have the dissolution made permanent as to intrastate traffic and to have a supervision over the future conduct of the defendants in respect thereto.

While some reference was made in the majority opinion of the judges of the United States District Court to the optional exchange of facilities between the Hocking Valley and the Toledo & Ohio Central as to its western division, no relief was granted in that court.

We think it is important that the two competing systems, to-wit: the Chesapeake & Ohio and the Hocking Valley on the one hand, and the Toledo & Ohio Central and the Kanawha & Michigan on the other, be completely divorced, and that such optional exchange of facilities is inconsistent, especially in view of the prior relationship and the tendency of these competing companies towards trade restriction.

It therefore follows that there should be a decree ousting the original defendants from the right to own or control the stocks of coal mining companies or continue the guaranty of bonds of such companies; that the defendants should also be ousted of the right to continue the exchange of facilities between the Hocking Valley and the Toledo & Ohio Central as

stipulated in the March, 1910, agreement, and that the Chesapeake & Ohio should be ousted from the right to own, control or have an interest in the capital stock of the Kanawha & Michigan Railroad Company.

The New York Central Railroad Company was properly made a party and the decree should operate against it as the successor of the Lake Shore & Michigan Southern Railroad Company.

The averment of the supplemental petition against the New York Central Company to the effect that that company is a competitor with the Toledo & Ohio Central, is in the nature of an original cause of action against the New York Central Company.

The chief contention upon this issue being that the Lake Erie, Alliance & Wheeling, operating in mining district No. 8, and now controlled by the New York Central Company, is a competitor of the Toledo & Ohio Central Company. It is true that the Lake Erie, Alliance & Wheeling Company was one of the transportation lines involved in the Morgan plan, and if the original Morgan plan was still in operation, or should be revived, the situation as to the Lake Erie, Alliance & Wheeling Company might be important, but in view of the relatively small amount of competition possible between the Lake Erie, Alliance & Wheeling and the Toledo & Ohio Central Company, and also in view of the fact that the New York Central did not stipulate as to the evidence brought into the record from the United States Court, we think so much of the supplemental petition as is involved under the averments as to competition between the New York Central Company and the Toledo & Ohio Central Company should be dismissed without prejudice.

Decree of ouster accordingly.

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Lake County.

**EFFECT OF FAILURE OF NEW ADMINISTRATOR TO GIVE
NOTICE OF HIS APPOINTMENT.**

Court of Appeals for Lake County.

THE CROXTON MINING COMPANY v. STERLING W. HUBBARD,
ADMINISTRATOR WITH THE WILL ANNEKED OF
JOHN H. BARTOW, DECEASED.

Decided, March, 1918.

Estates of Decedents—Purpose of Notice of Appointment of Administrator—Failure to Give Notice Prevents the Running of the Statute of Limitations—Loss, if Any, Falls on Heirs Rather Than Creditors.

By Section 10757, General Code, a new administrator is required to give notice of his appointment, and where he fails to do so, the limitation provided by Section 10722 will not avail as a defense to an action brought more than six months after the rejection of the claim.

Squires, Sanders & Dempsey and Harry E. Hammer, for plaintiff in error.

Holden, Masten, Duncan & Leckie, contra.

METCALFE, J.

This case was certified to this court from Lake county. Plaintiff here was plaintiff below and seeks to recover from the defendant, as administrator, etc., upon two promissory notes aggregating about \$18,000. These notes were executed by the firm of Drake, Bartow & Company to the plaintiff, the Croxton Mining Company.

The facts necessary to an understanding of the question before us are substantially as follows: The plaintiff is a mining company operating in Minnesota. The firm of Drake, Bartow & Company were dealers in iron ore and as such firm executed the notes in question to the Croxton Mining Company some time in the year 1910. In 1912 Mr. Drake died and by his death the firm

was dissolved, and soon afterwards an action was brought by the plaintiff upon these two notes against John H. Bartow, as one of the members of the firm of Drake, Bartow & Company.

Before the case was tried Mr. Bartow died and the action against him was dismissed. After the death of Mr. Bartow, Pauline L. Bartow was appointed executrix of his will. The plaintiff's claim was then presented to Pauline Bartow, as such executrix, but, before she had acted thereon, she died and the defendant, Sterling Hubbard, was appointed administrator with the will annexed, and on the 4th day of December, 1913, he rejected the claim.

After Mr. Hubbard's appointment as such administrator with the will annexed, he failed to give notice of his appointment and has never given such notice. Before the expiration of six months following the rejection of the claim a petition was filed against Hubbard, as administrator, and summons issued, which was returned not served, the defendant not being found in the county. No alias summons was issued until about seven months after the rejection of the claim, when such summons was issued and served upon the defendant.

It is claimed that by reason of the fact that more than six months passed from the date of the rejection of the claim until summons was served upon the defendant that the action was barred by the statute of limitations. That is the only question we have to determine, and such determination depends entirely upon the construction to be given to the language of Section 10757, General Code.

Section 10722, General Code, provides:

"If a claim against the estate of a deceased person be exhibited to the executor or administrator before the estate is represented insolvent and be disputed or rejected by him, and has not been referred within six months after such dispute or rejection, if the debt, or any part of it, be then due, or within six months after some part becomes due, the claimant must commence a suit for the recovery thereof or be forever barred from maintaining an action thereunder. No action shall be maintained thereon after such period by a person deriving title thereto from such claimant."

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It would seem to be an indisputable proposition that under the provisions of this section the plaintiff is barred, unless there is some saving clause in the statute which would relieve him from the necessity of beginning his action within six months from the date of the rejection of the claim.

It is claimed that such saving clause is found in the following provision of Section 10757:

"The new administrator shall give notice of his appointment in the manner prescribed with respect to an original administrator. If he fails so to do he shall have no benefit of the limitations herein provided."

Mr. Hubbard did not give notice of his appointment as new administrator of Mr. Bartow's estate, nor was such notice given by the probate judge.

The language of this section is plain and unequivocal, "If he fails to do so, he shall have no benefit of the limitations herein provided." This does not merely grant to the plaintiff a right, but it is an absolute prohibition to the administrator and takes away his right to plead the limitations "herein provided." As before stated, such notice was not given, but it is claimed that under the present provisions of the law such notice is not now required. As the law formerly stood, the administrator was required to himself publish notice of his appointment. Revised Statutes, 6097.

That section of the Revised Statutes has been amended and as it now stands in the General Code, as Section 10712, provides that within one month after bond has been given by the executor for the discharge of his trust, the *probate judge* shall cause notice of the appointment to be published in some newspaper of general circulation in the county in which the letters were issued, for three consecutive weeks.

Section 10757, however, remains unchanged, but it is urged that the requirement of that section that the "new administrator" give notice of his appointment is of no effect because the original administrator is not now required to give notice himself, but the duty to give such notice rests upon the probate judge.

What is the object of requiring notice to be given of the appointment of an executor or administrator? It is not for the benefit of the administrator. Plainly, it is for the benefit of the creditors alone that they may know within what time their claims must be presented. The object of the statute is not to require some particular person to give such notice, but to make sure that such notice shall be given. The fact that when the Legislature saw fit to amend Section 10722 it did not amend Section 10757 could not affect the manifest purpose of the statute. The reason for the requirement of that notice be given upon the appointment of a new administrator is just as apparent as the reason for giving notice of the appointment of the original administrator. The creditors have a right to presume that after the death or removal, as the case may be, of the original administrator, matters regarding the estate will remain in *statu quo* until notice is given of the appointment of the new administrator. The language of the statute is clear, plain and unequivocal, and to hold that upon the appointment of a new administrator no notice is required to be given is to ignore its provisions.

The limitations "herein provided" we think, plainly refer to the limitations upon the bringing of suits provided for in Chapter III, Title III, General Code; and the language of Section 10757 is controlling as to all such limitations.

In *Pollock v. Pollock*, 2 O. C. C., 140, it is held that it is error for the court to render judgment on a claim against the estate of a deceased person where the claim had been rejected more than six months before the action is commenced, and the failure of the executor to plead the statute did not give a right to a judgment. This decision only relates to the effect of the six months limitation where the fact which under Section 10757 suspends the operation of Section 10722 does not exist.

In the case of *Miller v. Ewing*, 68 O. S., 976, the only question, so far as it bears upon this case is, whether an unequivocal statement made by an administrator to a claimant that the claim was rejected and he would get nothing on it unless at the end of a law suit, was such a rejection as would set the six months limitation to running? The court held that it was,

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but no question of the suspension of the limitation was raised, and so in the case of *Harris v. O'Connell*, 85 O. S., 136, there is no question raised as to the suspension of the statute by the failure to give notice.

In the case of *In re Estate of Mary Ward*, 21 O. C. C., 153, the question is raised as to the right of the administrator himself to take advantage of the failure to give notice of the appointment in the prosecution of a claim in his own favor, the court say:

"Now, if he fails to give notice, he being the executor himself, if he fails to perform this duty which the statute imposes upon him, we are of the opinion that he can not take advantage of his own wrong. * * * He can not take advantage of his own neglect to publish notice."

In *Ardey v. Shell*, 77 O. S., 218, the holding is to the effect that the proof of publication of the notice of the appointment of the executor or administrator forms no part of the notice to creditors, and is not for the benefit of creditors; and that where the notice is given by publication as required by law, but, the proof of such publication is not filed for more than a year after giving bond, the two years limitation provided by Section 6113, Revised Statutes (10746, General Code), will begin to run from the date of the giving of the bond. No other question appears to have been raised in the case and we do not see how it has any application here. Plainly, to us none of these cases sustain the contention of the defendant in error.

We are unable to find that the question here involved has been passed upon in Ohio. We do, however, find some enlightening decisions from other states. In *Whiggins v. Admr. of Estate of Lovering*, 9th Mo., 259, the first paragraph of the syllabus is:

"The limitations of three years does not apply to demands against an estate unless the executor or administrator give notice of the grant of letters of administration as required by law."

And in the opinion, page 264:

"But although an executor or administrator can not waive this bar or destroy its effect, yet he may by his negligence in giving notice of his appointment prevent its accruing, and in

such case if either of the parties suffer a loss it must be the heirs or devisees and not the creditors."

In *Emerson v. Thompson*, 16 Mass., 428, the court say on page 431:

"* * * If either of the parties suffer a loss it must be the heir or devisee and not the creditor; it is contrary to the plain words of the statute to bar the creditor unless the notice is given as therein prescribed."

"It is the duty of an administrator *de bonis non* to give notice of this appointment the same as a general administrator." 1 *Rockwell, Ohio Probate Practice*, pages 160-166.

"The failure of the administrator to publish notice to the creditor of his appointment as required by statute is generally fatal to the interposition of this plea." (*The Statute of Limitations*, 2d *Woerner's American Law of Administration*, page 841.)

"The executor or administrator can not avail himself of the six months statute of limitations unless he has strictly complied with the statute requiring him to obtain an order of the surrogate for the publication of a notice to creditors to present their claims and has published the proper notice." *Hardy v. Ames*, 47 Barb., 431; *Elliott v. Cronks, Admr.*, 13 Wend., 35; *Wickmore v. Foos*, 1st Denio, 59; *Byron v. Monday's Admr.*, 17 Mo., 557; *Gardner v. Estate of Callaghan*, 61 Wis., 54; *Sewell v. Ballantine*, 23 Mass. (6th Pick., 276); *Corliss Steam Engine Co. v. Schumacker*, 109 Mass., 417.

We think these decisions clearly show that the purpose of the statute requiring the giving of notice is to advise creditors of the fact that an administrator has been appointed, and that if any negligence exists in the failure to give such notice, the loss, if any, occasioned thereby must fall upon the heirs and not upon the creditors. That the creditors have the right to rely upon the plain provisions of the statutes, and the failure to give notice prevents the administrator, or a new administrator as the case may be, from setting up the bar of the statute of limitations "herein provided."

It is the fact of the failure to give notice that suspends the bar to the statute.

POLLOCK, J., and FARR, J., concur.

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Sandusky County.

EJECTMENT AGAINST A PUBLIC SERVICE CORPORATION.

Court of Appeals for Sandusky County.

**FERDINAND SANER V. THE LAKE SHORE ELECTRIC RAIL-
WAY COMPANY.**

Decided, October 6, 1916.

*Ejectment—Removal Ordered of High Tension Electric Wires—Main-
tained Over a Lot Not Adjacent to the Company's Tracks.*

An owner of real estate not adjoining an electric interurban railroad may maintain an action of ejectment to require the removal of high tension electric wires which the company has erected over his land without his consent and uses for the transmission of power in the operation of its cars.

D. B. Love, for plaintiff in error.*O'Farrell & Rimelspach*, contra.

Error to the court of common pleas.

RICHARDS, J.

This case was in this court once before and on that occasion the judgment in favor of the railroad company was reversed on April 22, 1915, and the case remanded to the court of common pleas. After the case was remanded to that court the plaintiff filed an amended petition abandoning the claim for damages and asking only that the defendant be ejected from the premises.

The plaintiff is the owner of a portion of out-lot No. 156 in the city of Fremont, on which lot he had erected a foundation preparatory to the construction of a dwelling-house. The defendant has constructed across his lot and over the foundation three high tension wires, each carrying approximately eighteen thousand volts of electricity used in the operation of its electric railroad. After the plaintiff rested his case, the court directed a verdict for the defendant on the ground that the plaintiff had a remedy by compelling the defendant to appropriate an easement over the lot for the construction and maintenance of its

wires, and the sole question in this case is whether under these circumstances the plaintiff has the right of ejectment.

It is said that the owner of the life estate had granted the right to the railroad company to erect and maintain these wires; but however that may be, on the expiration of the life estate the right granted no longer existed.

We have had some difficulty in this case over the right of a person to maintain ejectment against a public service corporation engaged in the transportation of passengers and freight, and we are aware of the decisions which prohibit the sale of a portion of a railroad and likewise prohibit ejectment of a section of a railroad from a given piece of land, and holding that the remedy is to cause, in the one case, a sale of the whole road, and that the remedy in the other is damages. But in the case now under consideration the claimed right of the company is simply for the maintenance of these three high tension wires, and we think the rule thus announced ought not to be extended or made applicable to this kind of a case, especially in view of the fact that these wires make a circuit of a considerable distance through the northerly portion of the city along a route away from the right-of-way of the defendant company. It is clearly no objection to the right to maintain ejectment that no poles have been or will be actually erected by the defendant company upon the land of the plaintiff, for his land extends to the sky above and his right to maintain ejectment is the same as if poles had actually been constructed and were being maintained upon his land.

Holding that among the rights of the plaintiff is the right to maintain ejectment, the judgment will be reversed and the case remanded to the court of common pleas for further proceedings. We may suggest that if an order of ejectment should be granted in this case, its execution should be suspended for such reasonable length of time as will allow the defendant company to readjust or reconstruct its lines of wires.

CHITTENDEN, J., and KINKADE, J., concur.

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Clark County.

COMPETENCY OF TESTIMONY IN A WILL CASE.

Court of Appeals for Clark County.

MILTON J. BAIRD ET AL V. CAROLINE E. DETRICK ET AL.*

Decided, June 29, 1917.

Wills—Action to Contest—Testimony of Attorney Not Incompetent—By Reason of the Fact that He was a Subscribing Witness—Incompetency of Declarations Made by a Deceased Subscribing Witness.

1. Where a testator procured his attorney to become a subscribing witness to his will, he thereby expressly consents that said attorney may testify as fully as any other subscribing witness concerning declarations made to him by the testator at or near the time of execution of the will, and must be regarded as having waived the exemption of Section 11494, as to privileged communications.
2. Declarations made by a witness to the will immediately after leaving the room in which the will was executed do not constitute any part of the *res gesta*, and said subscribing witness having since deceased testimony as to the statements which he then made is incompetent.
3. Where from the nature of the remarks of counsel which are complained of it is possible that they may have been provoked by remarks of opposite counsel, a reviewing court will not reverse a judgment upon the ground of misconduct of counsel in the absence of the record showing so much of the statements of opposite counsel as would be necessary to disclose whether the remarks complained of were or were not provoked.

Stafford & Arthur, McGrew & Laybourne, William M. Rockel and W. Y. Mahar, for plaintiffs in error and certain defendants in error.

Zimmerman & Zimmerman, C. S. Olinger, for contestees of will.

KUNKLE, J.

This is an action in which plaintiffs in error seek to set aside the last will and testament of Clara J. Mills.

*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, October 23, 1917.

An issue was made up in the court of common pleas and the grounds relied upon for setting aside such will were, mental incapacity and undue influence.

The trial resulted in sustaining the will by the concurrence of nine members of the jury.

Motion for a new trial was overruled, and judgment rendered on the verdict.

Error is prosecuted to this court from such judgment.

Various grounds of error are assigned.

We have read the record in this case and have carefully considered the authorities cited in the very helpful and exhaustive briefs which have been filed by counsel.

We shall not attempt to quote from the record in detail nor to discuss the various authorities relied upon by counsel. We will merely announce the conclusions at which we have arrived after a careful examination of the record and such authorities.

Plaintiffs in error claim that C. S. Olinger, who was the attorney for the testatrix and a subscribing witness to the will, should not have been permitted to testify concerning certain declarations of the testatrix made to him at and near the time of the execution of the said will.

Upon this question we find there is some conflict of authority, but we think the weight of authority and the better reasoning upon this subject supports the ruling of the lower court. (See *American and English Encyclopedia of Law*, Vol. 23, page 79; *Thompson on Wills*; *Page on Wills* and various other authorities cited by counsel.)

The privilege conferred by Section 11494, General Code, is solely for the benefit of the client and may be waived by the client.

We think when a testator procures his attorney to become a subscribing witness to his will that he thereby expressly consents that such attorney may testify as fully as any other subscribing witness, and thereby waives the exemption of Section 11494, General Code.

The testator knows that his will is not to take effect until his death, and when he instructs his attorney to prepare a will along certain lines and requests him to sign the same as a wit-

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ness, it is presumed that he expects the attorney to testify generally as a witness in establishing such will.

The testator's requesting the attorney to act as a witness is equivalent to his calling him as a witness for the purpose of establishing the instrument so witnessed as a valid will.

It is also urged with much force that the trial court erred in refusing to permit plaintiffs in error to prove certain declarations alleged to have been made by Dr. R. B. House shortly after the execution of the will. Dr. House was one of the subscribing witnesses to the will. He testified at the time the will was probated, but died before the trial in the lower court.

The rule is well established that the testimony of a witness can not be impeached by showing contradictory statements, unless the attention of the witness is first called to such alleged statements and the opportunity is afforded the witness of either admitting, denying or explaining the same.

This rule is not changed by the subsequent death of the witness. (See 15 O. S., page 1.)

It is claimed, however, by counsel for plaintiffs in error that, as to the witness Mrs. Everhardt, the alleged statements of Dr. House were made immediately after coming out of the room in which the testatrix executed her will, and that such statements of Dr. House, one of the subscribing witnesses to the will, constituted part of the *res gestae*.

The *res gestae* consisted of the execution of the will in question and that was accomplished before Dr. House left the room in which the will was executed.

We do not know just how long the will had been executed before the Doctor left the room, but in any event, we are of opinion that Dr. House's alleged declarations to Mrs. Everhardt did not form any part of the *res gestae*.

It is claimed that the trial court erred in excluding, in chief, the testimony of Mrs. Jauck and others as to certain declarations alleged to have been made by Mr. Olinger, who drew the will.

Substantially all of this testimony was admitted in rebuttal and we are of opinion that the trial court properly excluded the same as testimony in chief.

It is further claimed that the trial court abused its discretion in various respects, such as in interrupting certain witnesses; in conducting the examination of certain witnesses to an unwarranted extent; and also in absenting himself from the bench during a considerable portion of the trial.

Before we could reverse the judgment in this case upon any of the above grounds, we would be required to find that the court had clearly abused its discretion in one or more of such respects and that the court had thereby prejudiced plaintiffs in error in the proper presentation of their case.

We concede that even in the trial of a civil case the parties are entitled to the presence of the trial judge during the trial and that it might be embarrassing to counsel to object to the court's absence from the court room, yet in order to predicate reversible error in the trial of a civil suit upon the absence of the trial court from the court room during a portion of the time it should appear that objection was made to such absence or that the absence of the trial judge clearly prejudiced the rights of plaintiff in error.

We also concede that the trial court should not unduly interfere with the examination of witnesses to the prejudice of either party, yet the trial court has a right to guide the trial, and if necessary, develop the facts requisite to a fair presentation of the case.

From a careful examination of the record, we would not feel warranted in finding that the trial court clearly exceeded its authority in any of the above respects and to the extent of preventing plaintiffs in error from having a fair trial.

Exception is also taken to the admission and rejection of certain testimony.

We have considered all the objections of this nature complained of in the briefs of counsel for plaintiffs in error. In some of these instances the substance of the testimony either had already been or was subsequently admitted; in other cases the questions were not proper in form and in still other cases the evidence sought to be introduced was incompetent.

We find no error in these respects which we consider prejudicial to plaintiffs in error.

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It is further claimed by counsel for plaintiffs in error that counsel for defendants in error were guilty of misconduct during the argument of the case to the jury.

We have doubt as to whether the alleged misconduct of counsel for defendants in error has been brought in the record as required by the decision of our Supreme Court in the case reported in 77 O. S., page 529.

Assuming, however, that the evidence of alleged misconduct is properly before the court, it appears that only a portion of the arguments of counsel are presented. The record does not disclose what remarks, if any, were made by counsel for plaintiffs in error which may have provoked some of the remarks now complained of.

In the absence of a full report of the arguments of counsel we would not feel justified in holding that the alleged misconduct of counsel for defendants in error was such as would justify a reversal of the judgment.

Counsel for plaintiffs in error also insist that the trial court erred in giving to the jury in advance of the argument special instruction No. 2 as requested by counsel for defendants in error. This special charge is not as complete as it should have been, but nevertheless it is practically the same, in the respects complained of, as special charge number five, which was given by the court to the jury in advance of the arguments at the request of counsel for plaintiffs in error.

Special charge No. 5 being given at the request of counsel for plaintiffs in error we can not see how it could be prejudicial to also give special charge No. 2 as requested by counsel for defendants in error.

It is admitted that this phase of the case was properly stated by the court in the general charge to the jury.

We are also of opinion that the alleged misconduct of the jury is not supported by the weight of the evidence.

The newly discovered evidence referred to was largely cumulative and we think the trial court did not err in refusing to grant a new trial on the ground of newly discovered evidence.

There was a sharp conflict in the testimony. A number of witnesses called by defendants in error testified to a state of

facts which, if believed by the jury, would have justified the verdict which was returned. It is equally true that a number of witnesses called by plaintiffs in error testified to a state of facts which, if believed by the jury, would have required a different verdict.

The decision of the case was largely a question of determining the credibility of the various witnesses and the weight which should be given their testimony. These are questions which are peculiarly within the province of the jury and from a careful consideration of the entire record, we would not feel warranted in disturbing the judgment upon the ground that the verdict is against the manifest weight of the evidence.

We have considered all the assignments of error urged by counsel for plaintiffs in error in their briefs but finding no error in the record which we think constitutes error prejudicial to plaintiffs in error, the judgment of the lower court will be affirmed.

If desired, a suspension of the execution of the judgment for twenty days will be allowed, so as to enable counsel to present the case to the Supreme Court.

ALLREAD, J., and FERNEDING, J., concur.

**FORCIBLE ENTRY AND DETAINER BEFORE A
JUSTICE OF THE PEACE.**

Court of Appeals for Mahoning County.

MARKO BUCILLI ET AL V. EMIL J. HOFFMAN ET AL.

Decided, 1918.

Jurisdiction—Of a Justice of the Peace in Forcible Entry and Detainer Cases—Sections 10223 and 10224.

1. In actions of forcible entry and detainer the jurisdiction of the justice of the peace is co-extensive with the county, but such jurisdiction must be exercised in the township in which he is elected.
2. Where a justice of the peace issues summons in a case of forcible entry and detainer, returnable in a township of the county other

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than the one in which he is elected and hears the case and renders judgment in such other township, the judgment is void.

J. M. Moderrelli, for plaintiff in error.

David Steiner, contra.

METCALFE, J.

The plaintiff in error seeks to obtain an injunction against the defendants in error to prevent the enforcement of a judgment of eviction in a case of forcible entry and detainer, claiming that the judgment is void for want of jurisdiction in the justice of the peace to render the same.

The plaintiffs are lessees of the property in question, which is situated in the township and city of Youngstown, and the defendant, Hoffman, is the lessor. This action was brought by Hoffman in the court of the defendant Brown, a justice of the peace. Brown was elected to such office of justice of the peace in the township of Boardman, Mahoning county, but maintained an office in the city of Youngstown.

The summons in this case was issued by the justice returnable at his office in the city of Youngstown, and the case was tried and judgment rendered therein in the city of Youngstown, and not within the limits of the township of Boardman.

The only question we have here is: Did the justice of the peace, in an action in forcible entry and detainer, have the right to hold court and render judgment in a township other than the one in which he is elected? This court has held in the case of *Railway Co. v. Skipp* (unreported), that he may do so in a criminal case, and the Supreme Court have decided the same thing in *Steele v. Karb*, 78 O. S., 376, in both of which cases it is held that in criminal cases the jurisdiction of the justice is co-extensive with the county containing the township in which he was elected, and that he may hold court anywhere within the county. His power is granted under Section 13422, General Code, which provides that he shall be a conservator of the peace, and that he may upon view or information cause the arrest of a person and issue a warrant commanding him to be brought before himself or before some other justice of the peace within the county.

We do not think, however, that such is the case in any civil action. By Section 10223 it is provided:

“Unless otherwise directed by law the jurisdiction of justices of the peace in civil cases is limited to the township wherein they were elected and wherein they reside. No justice of the peace shall hold court outside of the limits of the township for which he was elected.”

This provision is perfectly clear and prohibits a justice from holding court in all civil cases outside of the limits of the township for which he was elected, unless otherwise directed by law.

It is claimed here that he is otherwise directed by Section 10224, General Code, Paragraph V, which confers upon the justices of the peace jurisdiction to try forcible entry and detainer cases throughout the county, that is to say, his jurisdiction to try that class of cases is co-extensive with the county, but that does not confer the right upon him to go outside of his township, issue summons outside, returnable outside, and hold court and render judgment outside in view of the explicit provisions of Section 10223 that no justice shall hold court outside of the township in which he is elected.

We think that such action is entirely unwarranted and that the defendant, Brown, could not exercise the jurisdiction of a justice of the peace outside of the township in which he was elected, but plainly has the right to bring the defendant in such case into the township where he was elected.

Judgment for plaintiff.

POLLOCK, J., and FARR, J., concur.

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Cuyahoga County.

CERTIFICATION OF STREET IMPROVEMENT ORDINANCES.

Court of Appeals for Cuyahoga County.

THE GUARDIAN SAVINGS & TRUST COMPANY, AS TRUSTEE UNDER
THE WILL OF J. G. W. COWLES, DECEASED, v. CITY OF
CLEVELAND ET AL.

Decided, March 4, 1918.

Municipal Corporations—Method of Levying Assessments for Street Improvements—Certification of Assessing Ordinance Directory Only—Provision for Five Per Cent. Additional from Date Assessment Falls Due—Not a Penalty But a Fixing of the Rate of Interest.

1. The validity of an assessment ordinance for a street improvement of a municipality is not affected by its certification or lack of certification to the county auditor.
2. Section 3893, General Code, providing that such certification shall be made on or before the second Monday in September each year is directory merely.
3. Where a city charter provides that forty days must elapse after the passage of ordinances in order to allow a referendum upon the same, before they become effective, and an assessment ordinance is passed fixing a date for the payment of the assessment earlier than the date at which such ordinance becomes effective, such defect or inconsistency is cured both by the taking effect of the ordinance, and by the provisions of Section 3911, General Code, providing that such proceedings shall be liberally construed and formal objections disregarded.

Maurer, Bolton & Wilson, for the plaintiffs.

Wm. B. Woods, contra.

DUNLAP, J.

This cause comes into this court on appeal from the court of common pleas.

Plaintiff's petition recites that plaintiff is the owner as trustee of certain real estate described in the petition located in part on East 140th street, in part on East 141st street and in part on East 143d street; also the passage of three ordinances

by the city of Cleveland, one of the defendants herein, to-wit: "An Ordinance Determining to Proceed with the Improvement of East 140th Street," "An Ordinance Determining to Proceed with the Improvement of East 141st Street," and "An Ordinance Determining to Proceed with the Improvement of East 143d Street," copies of which containing their respective dates of passage are fully set out; said ordinances respectively fixing October 1st, 1916, November 1st, 1916, and November 1st, 1916, as the date for the payment of the assessment for said improvements, and reciting that bonds or notes of the city of Cleveland shall be issued in anticipation of the collection of assessments by installments. The petition recites that said ordinances were approved by the mayor on the following dates respectively: September 4th, 1916, October 19th, 1916, and October 19th, 1916, and that they became effective respectively, October 22d, 1916, November 26th, 1916, and November 26th, 1916. It then cites the amount of the assessments levied on each lot by virtue of these different ordinances, and that bonds or notes of the city of Cleveland have been issued in anticipation of the collection of said assessments and that after the second Monday in September of the year 1916, the city of Cleveland by its clerk of council caused to be certified to the auditor of the county said assessments, stating the times of payment and the amounts thereof as fixed by said ordinances, including five per cent. increased interest charges. The petition then charges that all of said ordinances are unconstitutional, illegal and void, in that they authorize a taking of property without due process of law, because each provides that interest at the rate of five per cent. payable annually in advance should be added and collected, unless the total amount of each assessment be paid on or before the date fixed for said payment in said ordinances which date by the ordinances is earlier than the date at which the ordinances become effective, thereby as it is claimed attempting to require the plaintiff either to pay an assessment not then lawfully imposed, or in default of such payment to suffer a penalty of five per cent. interest payable annually in advance after such default. Claim is then made that the action of the

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city of Cleveland in certifying and of the defendant Zangerle as auditor in accepting certification placing the assessment upon the county tax list was illegal and void, in that the same was not done prior to the second Monday of September of the year 1916; that in spite of such illegality the said auditor has placed all of said assessments as certified upon the tax list of the county; that the first half of the first installment thereof was due and payable January 20th, 1917, and is now delinquent, and that the second half thereof will become due and payable July 20th 1917, after which it will be delinquent, and that the defendant O'Brien as treasurer will unless restrained collect said assessments which are now due and add penalties, etc.; that all of said assessments constitute a lien and incumbrance on plaintiffs' property to his irreparable injury and that he has no adequate remedy at law. An injunction is prayed for and an order requiring the cancellation of said assessments upon the tax records. An amended and supplemental petition is also filed which, while not changing the allegations of the first petition, add to it the allegation that the plaintiff in its capacity as trustee deeded many lots during the year 1916 to various grantees, covenanting that said properties were free and clear of all incumbrances except taxes and assessments for the year 1916, which taxes and assessments the plaintiff agreed to pay, and that it will be required to pay some \$23,000 which it had not contemplated paying unless the defendants are restrained and the taxes canceled, etc.

The city of Cleveland being the only real party in interest alone answers, admitting many of the allegations of the petition but denying the unconstitutionality and illegality of any of its acts and alleging that all of the proceedings were in accordance with the charter of the city of Cleveland and the laws of the state of Ohio, setting out the sections of the charter deemed appropriate and the proceedings had thereunder.

The case was tried upon an agreed statements of facts, fully sustaining all the allegations of both of the petitions and the answer, which we regard as material in the determination of this case, and also the following statement not contained in any of the pleadings:

"That the custom and practice is and has been in Cuyahoga county that assessments levied and certified to by officials of the city of Cleveland have been and are received each year for collection by the auditor after the second Monday in September, until such time as it is no longer possible because of bookkeeping necessities to include such assessments in the tax duplicate as made up for each year, and that in placing the assessment in this case on the tax duplicate for 1916 the city and county officials acted in accordance with such established custom."

The plaintiff contends for a judgment on its behalf upon two main grounds or reasons, first, "that the certification not being made on the date required by statute failed to charge the properties with any lien such as could be enforced by the county treasurer by proceedings for the collection of taxes or assessments," and, second, "that the ordinances themselves are invalid because they impose a penalty for failure to pay on or before a date when payments could lawfully be demanded."

The case is important both on account of the amount involved and for the reason that future bond issues for the improvement of city streets must be largely controlled by a correct decision of this case.

The first question to be considered is whether in the certification of the clerk of the council to the county auditor he must follow the provisions of Section 3892 of the General Code of Ohio, as contended for by plaintiffs' counsel, which provides:

"When any special assessment is made, has been confirmed by council, and bonds, notes or certificates of indebtedness are issued in anticipation of the collection thereof the clerk of council *on or before the second Monday in September, each year, shall certify* such assessment to the county auditor stating the amounts, and the time of payment. The county auditor shall place the assessment upon the tax list in accordance therewith, and the county treasurer shall collect it in the same manner as other taxes are collected." * * *

Or is it proper for him to certify as provided for in Section 3905 of the General Code as contended for by defendants' counsel, which section is as follows:

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“The council may order the clerk or other proper officer of the corporation to certify any unpaid assessment or tax to the auditor of the county in which the corporation is situated, and the amount of such assessment or tax so certified, shall be placed upon the tax-list by the county auditor, and shall, with ten per cent. penalty to cover interest and cost of collection, be collected with and in the same manner as state and county taxes, and credited to the corporation. Such ten per cent. penalty shall in no case be added unless at least thirty days intervene between the date of the publication of the ordinance making the levy and the time of certifying it to the county auditor for collection.”

Or is it essential that either of these two sections be strictly complied with? The plaintiff prays to be relieved of the payment of the first installment of this assessment not for any illegality or informality in the levying of the same (except as we shall hereinafter note) but because of irregularity in the certification of the same to the county auditor. Our statutes relating to this subject of certification are somewhat confusing and perhaps inconsistent, and if the validity of assessments depended upon the actual compliance with the law relating to the certification we doubt if many valid assessments of property could be found. Indeed, the certification is not necessary at all. Municipalities are very much a law unto themselves. They have the power to levy an assessment and the power to collect the same wholly independent of the county auditor and county treasurer's offices. From the very nature of things their action with regard to certification is a sort of private matter. It does not concern us much as to just what agencies the city uses to collect a valid assessment, but the Legislature of the state did see fit to legislate upon this subject. In a way it tendered to the cities of the state the services of the county auditor and treasurer. Some municipalities accept these services fully as is apparently done by the city of Cleveland; some do not. We are informed that Cincinnati, for instance, collects its own assessments through the city treasurer, and only certifies to the county auditor such installments of the assessments as are delinquent. There is no doubt but that it does not need to certify

even these delinquent installments for the same may be collected by suit at law just the same as any other debt.

With this simple understanding of the matter in our minds it becomes apparent that the statutes with regard to certification are permissive merely. At most only directory. Of course if they are to be used they should be followed but the failure to observe them to the letter does not give the property owner whose property has been assessed the opportunity to destroy the assessments. Such a procedure would not be the direct attack which the law requires in such matters, but would be at best a collateral attack to which the law is most unfavorable. The proper method to make officials perform their duties according to statutes is by the action in mandamus. We are not therefore deeply concerned as to which one of the two Sections 3892 and 3905 of the General Code furnish the proper rule for certification. A contention of this kind can only becloud the real issue and tends to make us lose sight of the real questions in our zealous adherence to the merits of the one or the other section. Through all the fog thus raised we must keep in view the main question, "Can cities levy assessments? They can. How do they do it? By the proper action of their councils. When are these assessments payable? At the time mentioned in the ordinance. Where are they payable? To the city treasurer. What is the function of the auditor and treasurer of the county in such cases? They are at most simply the agencies afforded by the Legislature to municipalities for the speedy, effectual collection of these assessments. The answers to these questions clear away the fog. There is no longer any mystery. We see the process clearly; a lawful ordinance is passed levying an assessment; the amount of this assessment becomes a lien; a time is fixed for the payment; that time is in the instant case under one ordinance October 1st, 1916, and under the other two ordinances November 1st, 1916. The obligations on the part of the defendant property holders concerned to pay at that time is complete and binding. Even if we took a narrow view of the situation and enjoined the county treasurer from collecting on the ground of faulty certification there would remain the

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binding obligation to pay to the city treasurer. The supplemental petition states that the plaintiff is largely interested because it has sold lots assessed by this ordinance with the agreement that it would pay any installment of any assessment falling due in 1916. For its information with regard to the assessments it was its duty to look to the proper authorities of the city of Cleveland. The law is plain and clear that such assessments are payable at the time fixed by the ordinance levying the same.

It is complained of in the petition, though not strongly insisted upon in the brief, that the ordinances are invalid because the due date or date when the assessment was payable was fixed at a date prior to the date at which the ordinance became effective. Under the city charter ordinances do not go into effect until forty days after their passage. Until the forty days are up they are subject to a referendum. In the absence of such a thing they immediately become effective. Strictly speaking this means that the whole ordinance as written goes into effect which of necessity includes the effectiveness of said due date. Such an ordinance while revealing an apparent inconsistency is not rendered thereby void. If it is an irregularity, we think it plainly falls within the provisions of Section 3911, General Code, which provides that:

“Proceedings with respect to improvements shall be liberally construed by the councils and courts, to secure a speedy completion of the work, at reasonable cost, and the speedy collection of the assessment after the time has elapsed for its payment, and merely formal objections shall be disregarded, but the proceedings shall be strictly construed in favor of the owner of the property assessed or injured, as to the limitations on assessment of private property, and compensation for damages sustained.”

And in this view we are upheld by the decision in the case of *Bolton v. City of Cleveland*, 35 O. S., 319, the second paragraph of the syllabus of which is as follows:

“By an assessing ordinance, passed by the city council of the city of Cleveland, on the 31st day of July, 1866, under authority of the act of May 3, 1852, the abutting lot owners

were required to pay the assessment on the 28th day of the same month: *Held*, That the defect in the ordinance was within the curative provisions of Section 31 of said act."

In that case the curative provision was not as strong as we read it as the present curative section of the code quoted above.

This consideration practically disposes of all the claims of counsel in the case.

The additional claim that the ordinance is invalid because a penalty of five per cent. is imposed from the due date we regard as not well taken, because the five per cent. is not a penalty but is a provision of the ordinance providing the rate of interest such assessment shall bear after the time that it is due or payable. It is an essential part of such ordinances. Without it the fund raised by the assessment would be insufficient to meet the bonds as they fall due. There being then no penalty there is no ground for the claim "that the ordinances are invalid because they impose a penalty for failure to pay on or before a date when payments could lawfully be demanded."

The plaintiff in this case had every facility for complete knowledge of the probable action of the city council long before that action was taken. After the passage of the preliminary resolutions, but early in the year 1916, certain notices required by law to be served on the property owners interested were served upon it. These notices were to the effect that objections to the improvement would be heard by the proper authorities. The plaintiff remained silent, thus tacitly consenting to the improvement. It had ample means of thus knowing that an assessment would probably be levied payable before the end of the year. If with this information it saw fit to warrant in its deeds to purchasers of lots in the manner set out above, we think it has no ground to complain. It took its chance, and we are of the opinion that this court can grant no relief.

Judgment is entered for the defendants and the petition is dismissed at plaintiff's cost.

GRANT, J., concurs; LIEGHLEY, J., concurs in judgment.

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**DETERMINATION AS TO THE CAUSE OF COLLAPSE
OF A BUILDING.**

Court of Appeals for Hamilton County.

**THE HARTFORD FIRE INSURANCE COMPANY V. THE CINCINNATI
ICE MANUFACTURING & COLD STORAGE COMPANY.**

Decided, April 15, 1918.

Insurance—Policy Not Voided for False Swearing—Where a Loss Was Claimed Without Any Combustion Being Shown—Application of the Valued Policy Rule—Competency of Photographs Showing Buildings Damaged by Storm During Which Plaintiff's Building Fell—Finding of Jury Sustained as to Cause of Collapse of Building.

1. When a policy of fire insurance, by attaching a so-called lightning clause thereto had been extended to cover a direct loss occasioned by lightning, without otherwise stating or repeating contract stipulations for lightning as contained in the body of the policy in regard to fire, and during a storm the building so insured collapsed and was damaged but no combustion occurred and it was a question whether the fall of the building was caused by a stroke of lightning or by the force of the wind, liability under the policy can not be avoided for fraud and false swearing merely because the affidavit for proof of loss improperly termed the loss a "fire" loss, where there was no attempt to mislead or defraud the insurance company.
2. The valued policy rule, provided by Sections 9583 and 9584, is applicable, under a policy covering an ice making plant, to the cooling tower and the machinery contained therein, where the machinery and buildings are used as an entirety and come within the terms of the valued policy act both as to the amount of damages and pro rating of the loss.
3. It is not error to exclude photographs of collapsed buildings which it is claimed were in the path of the storm prevailing at the time plaintiff's building collapsed, where the buildings shown in such photographs were located many squares distant from plaintiff's building and the record fails to show that they were in the path of the particular windstorm which the insurance company claims destroyed plaintiff's building.
4. An insurance company is not at liberty to refuse to name an appraiser in accordance with the provisions of the policy in suit,

where the only reason for so doing is that work has been done in the way of restoring the damaged property.

5. Where the evidence is conjectural as to whether the collapse of a building was due to the force of the wind or to a bolt of lightning, and an explanation is offered as to how a bolt of lightning might have damaged a wall and thus caused the collapse without combustion occurring, a finding by the jury to the effect that the fall of the building was due to lightning will not be disturbed by a reviewing court.

Black, Swing & Black, J. W. Mooney and R. M. Edmonds, for plaintiff in error.

Harmon, Colston, Goldsmith & Hoadly, Oscar Stoehr, Galvin & Galvin and J. L. Kohl, contra.

JONES, P. J.

This is an action brought by defendant in error, the Cincinnati Ice Manufacturing & Cold Storage Company, as plaintiff below, against plaintiff in error, the Hartford Fire Insurance Company, as defendant below (which parties will be hereinafter referred to, for convenience, as plaintiff and defendant, respectively), to recover upon four policies of insurance for a loss to the buildings and ice manufacturing machinery of the plaintiff claimed to have been caused by lightning.

There is no question but that the cooling-tower situated upon the roof of the highest building did fall down during a storm, resulting in serious damage and loss to plaintiff. No part of the property, however, was consumed by fire nor so far as the record shows was combustion started as a result of the lightning. The main contention between the parties is whether the fall of the cooling-tower and the damage occasioned thereby resulted from lightning or was caused by the severe windstorm.

Upon trial to a jury a verdict was rendered in favor of the plaintiff upon which judgment was entered. It is sought in this proceeding to secure a reversal of that judgment.

The first ground urged for a reversal by plaintiff in error is that defendant in error was chargeable with fraud and false swearing in the proofs of loss made by it to the insurance company, and that the court refused to give the insurance company's

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special charges 9 and 10 which sought to make void the policy because of such false swearing.

The clause of the policy under which this defense is made is as follows:

“This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.”

Each of the policies sued upon insured plaintiff in stated sums “against all direct loss by fire, except as hereinafter provided” on certain buildings and structures; also upon certain boilers, engines, ice machines, machinery, shafting, belting, pulleys, pipes, etc., therein situated, occupied and used in manufacturing ice and in refrigerating their cold storage rooms.

It is stipulated in a printed form in the body of the policies “that the company shall not be liable for loss caused directly or indirectly by invasion,” etc.; “or (unless fire ensues, and, in that event for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.” “If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.”

By a printed slip, however, attached to the policy and made part of it, designated as “Lightning Clause,” it is provided: “This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term ‘lightning,’ and in no case to include loss or damage by cyclone, tornado or wind-storm) not exceeding the sum insured, nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy.”

By these provisions it was undertaken to insure the property against damage by lightning, whether or not fire ensued, and any direct loss or damage caused by lightning although not the

result of actual combustion. Nowhere in the policy outside of the two above references is loss resulting from lightning mentioned or provided for except by classing it as a fire loss. The proofs of loss submitted by the insured to the company used the word "fire" as it appears throughout the policy to describe the loss, and while they specifically refer to each policy of insurance against loss or damage by fire according to the terms and conditions printed therein, and specifically state that a fire occurred by which the property described in said policy was destroyed or damaged, said fire originating "from stroke of lightning," and otherwise refer to fire as the cause of damage, there is no direct statement in the affidavits that the building or any part of the property insured was consumed by fire, or that any combustion ensued, but merely that loss and destruction resulted.

The word "fire" is evidently used as a generic term to cover all losses protected by the policy and can not be construed to refer to losses by combustion alone. The record contains much interesting testimony given by expert scientists as to the nature and manifestations of lightning and electrical discharges from the clouds during thunder storms, but it is apparent that exact rules can not be adduced from the phenomena collated as to what results follow when a building is "struck by lightning." Lightning is always accompanied by some flash of light caused by incandescence or burning of gas, so to that extent fire is a usual manifestation. The damage caused by lightning, however, by a shock knocking down a tree or building, is not necessarily followed by or the result of combustion, yet it would be a direct loss or damage caused by lightning within the terms of the "Lightning Clause" in these policies, and the contrast between the terms of the lightning clause and the provision in the body of the policy above referred to which exempts such damage unless fire ensues is a recognition of this difference. While that may not be material it is shown by the record that the proofs of loss used in this instance were prepared on blank forms printed for the use of the insured in such cases of loss and conform to the language of printed policies used for fire losses

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which by the addition of the printed lightning clause stipulation have been adapted also to insure against lightning.

There is no question but that the ordinary fire policy such as was used in this case would cover damage from water or from smoke or from the collapse of a building which was the result of fire although actual combustion may not have entered into the particular loss itself, and undoubtedly these policies as enlarged by the addition of the lightning clause cover damage by lightning where combustion is not an element.

Placing this construction, therefore, upon the policy and proof of loss, and considering the testimony of Mr. Schell and Mr. Lippincott, called on behalf of the insurance company, and of the officer and employee of the insured, we can not find that there was any evidence of fraud or false swearing introduced which would require or justify the giving of special charges 9 and 10—as they must be given or refused in the exact language in which they were presented—and the court therefore was not in error in refusing them. Undoubtedly a provision in a policy avoiding liability under it for fraud or false swearing occurring in the proofs of loss is upheld and constitutes a complete bar to any recovery under the policy (*Insurance Co. v. Beverly*, 14 C. C., 468), but it is a general rule that misstatements in a proof of loss to forfeit the policy must be not only false, but unlawfully false. A mere innocent mistake will not amount to fraud or false swearing within the provisions of the policy. (4 Cooley Briefs on the Law of Insurance, 3415.) We also find that the part of the general charge as given by the court in relation to this claim of false swearing was a proper charge and all that the defendant was reasonably entitled to.

The plaintiff in error next urges as a ground of error that the verdict and judgment are excessive, and that the charge of the court in fixing the amount of recovery is erroneous because the pro rating clause in the policies in suit were disregarded, and because the other concurrent insurers were necessary parties to the action. It is particularly urged that even though the valued policy rule provided by Sections 9583 and 9584, General Code, might be applied to the first paragraph of the description

of the property improved, limited particularly to the buildings, it could not apply to the property constituting the cooling tower and ice making machinery as detailed and described in the second clause of the property insured for the reason that the latter must be deemed personal property or chattels, as distinguished from real estate.

A very lengthy and impressive discussion is furnished by counsel for plaintiff in error in numerous briefs to support this contention, but the correctness of their position depends upon a conclusion that the judgment of the Supreme Court in the case of *Fire Ins. Co. v. Dennison*, 93 O. S., 404, is not sound law and does not properly construe Sections 9583 and 9584. In our opinion, the decision in that case is correct; but if counsel are right in this contention they must address their argument to the Supreme Court rather than to the court of appeals, as this court is conclusively bound by the decision of the Supreme Court and it is useless for counsel to undertake to have us disregard or refuse to follow it.

The case of *Insurance Co. v. Luce*, 11 C. C., 476, holds that property situated and used as was the ice machine property in this case constitutes fixtures, and whether technically a part of the real estate itself or not, the items enumerated in the second paragraph of the description of property in the policies all constitute "structures" within the terms of Section 9583. The testimony of Mr. Siegel giving the details of the items included in this property and the damage thereto, none of which testimony was challenged or disputed, shows that the building, fixtures and machinery were used as an entirety and came within the terms of the valued policy act and the authorities above mentioned both as to the pro rating and as to the amount of the damages. The court, therefore, did not err in refusing to give special instruction No. 11 or in its general charge instructing the jury that these items properly were "structures" within the contemplation of the law of the state of Ohio.

It is also urged that the trial court erred in excluding photographs representing damage by wind to other buildings in Cincinnati which were claimed to have been in the path of the storm in which plaintiff's buildings were damaged.

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The admission of such evidence was largely in the discretion of the trial court. It appears that the two photographs offered represented collapsed buildings which were located many squares away from the property involved in this case, and the record fails to show definitely and conclusively that they were in the path of the particular wind-storm which defendant contends caused plaintiff's damage. We can not say that the court erred in refusing to admit this evidence.

Nor do we find that the court erred in allowing questions to be asked of Mr. Lippincott, the insurance adjuster, as to the extent of plaintiff's loss—especially so, as the witness failed to directly answer the question excepted to in such a way as to fix any definite sum.

There is no question but that under *Weil v. Connecticut Fire Ins. Co.*, 23 C.C.(N.S.), 281, and other cases cited, the insurance company was entitled, upon its disagreement with the insured as to the extent of the loss, to have an appraisal by virtue of the terms of the insurance policy; but when the insured named its appraiser and requested the insurance company to also name an appraiser in accordance with the provisions of the policy, the insurance company could not refuse to do so merely because work had been done by the insured in the way of restoration of the property damaged.

As a part of its general charge, the court said:

“The first question you will determine when you retire for deliberation will be, what caused the loss and damage? If you find from all the evidence, facts and circumstances of this case that the loss and damage was caused by a stroke of lightning, then your verdict should be for the plaintiff.”

While it is true that this clause taken alone would be erroneous, though positive in its form, it must be taken in connection with all the remaining parts of the general charge which set out and discuss the different defenses of the insurance company and cover the entire case. We can not therefore say, considering the charge as a whole, that the use of the language quoted, taken with the remainder of the charge, served to mislead the jury, or was so prejudicial to the defendant as to require a reversal.

The main contention, however, is that the verdict was contrary to the manifest weight of the evidence.

The record discloses very interesting testimony in regard to the cause of the injury and the character of the storm. It is argued on behalf of the insurance company that the evidence conclusively shows that the collapse of the cooling tower and the consequent damage to the building was caused by wind, and to support their contention they have produced the testimony of the United States weather reports and the observer as to the local record of the direction and velocity of the wind, amount of rain and general characteristics of the unusual storm which visited the locality at the time of the damage. They also argue that lightning would necessarily have shown some fusing or burning of the metals or wood showing the track taken by the electric current and that the lightning would have followed water pipes which extended higher and outside of the brick wall. On behalf of the plaintiff it is with equal force contended that the evidence submitted conclusively shows that the time of the actual collapse of the cooling tower and the consequent damage coincided exactly with a stroke of lightning and severe thunderclap which was testified to by numerous railroad men and others who were in the immediate vicinity and that it preceded by some distinct period of time the strong wind which followed. It is insisted that this was absolutely shown by the fact that the dense ammonia fumes were blown from the collapsed building south and southeast under the Eighth street viaduct and as far as Pearl street down Eggleston avenue, upon which the railroad tracks were located and on which tracks and the adjoining switch tracks a number of witnesses were then engaged in shifting cars. It is also insisted on behalf of plaintiff that the brine pipe offered the best conductor for the electricity, so near the top of the building that it would be preferred by the electric current to either the water pipe or the brick walls, and that the lightning might well have demolished enough of the brick wall to reach this brine pipe and follow it down to the earth without showing other evidence than the broken wall at the top which caused and was obliterated by the falling of the cooling tower.

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While, of course, in the very nature of things a difficult question is raised as to just what caused an accident such as this, the issue is one which is peculiarly the province of the jury to decide. A careful consideration of all of the minute and interesting evidence and careful arguments of counsel submitted in this case fails to convince the court that the verdict of the jury can be held contrary to the manifest weight of the evidence; nor do we find in the numerous points suggested any prejudicial error which would require a reversal of the judgment, which therefore must be affirmed.

HAMILTON, J., concurs.

**MUNICIPAL CONTROL OF GASOLINE AND OIL
FILLING STATIONS.**

Court of Appeals for Franklin County.

CITY OF COLUMBUS, STATE OF OHIO, EX REL THE MOORE OIL
COMPANY, v. JOSEPH DAUBEN, AS BUILDING INSPECTOR
OF THE CITY OF COLUMBUS.

Decided, November 7, 1917.

*Municipal Corporations—May Prescribe Conditions Under Which
Gasoline and Oil Filling Stations May be Operated—Use of Ex-
isting Plants Not Affected—But to Greatly Enlarge a Plant Sub-
jects it to Regulative Ordinance.*

1. The Columbus ordinance regulating the location, construction and operation of public gasoline and oil filling stations or sales depots is not open to constitutional objection, but the provisions of this ordinance are prospective and are not applicable to the maintenance or operation of gasoline or oil filling plants in existence at the time the ordinance became effective.
2. But an owner who undertakes to tear down an existing structure, used as a sales or gasoline or oil filling depot, and to erect a new plant with greatly increased capacity and equipment can not claim exemption from the provisions of a regulative ordinance.

Weber, McCoy & Jones, and H. S. Kerr, attorneys for Relator.

Henry L. Scarlett, James M. Butler, E. E. Burns and L. L. Boger, attorneys for defendant.

KUNKLE, J.

This is an action in mandamus in which the relator seeks to compel the defendant, the Building Inspector of the city of Columbus, to issue a building permit to relator for the reconstruction of a public oil and gasoline filling station, including tanks and buildings, at the corner of Broad and 21st streets in the city of Columbus.

Defendant refuses to issue such permit upon the sole ground that the relator has not complied with the provisions of section one of Ordinance No. 28932 of the city of Columbus, regulating the location, erection and maintenance of public oil filling stations, and which ordinance was passed by the council of the city of Columbus, July 1915, and approved by the mayor of said city July 3rd, 1915. The provisions of said ordinance are as follows:

"Section 1. That it shall be unlawful for any person, firm or corporation for themselves or as agents, renters, or lessees, to locate, build, erect, construct, maintain, or operate any public gasoline or oil filling station or sales depot on or within 187½ feet from curb line of any street in the city, or to construct or maintain a driveway from the street over the curb and sidewalk to such station or depot, when three-fourths (¾) of the buildings on both sides of the street for a distance of five hundred (500) feet in either direction from the proposed location of each wall of such oil filling station or sales depot are used exclusively for residence purposes, without first securing the written consent of two-thirds (2/3) of the owners of the property abutting on the street for a distance of 500 feet in each direction from the median line of such proposed oil filling station or sales depot, according to the frontage on both sides of the street.

Section 2. Any person, firm, or corporation, or any agent, renter, or lessee, of any such person, firm or corporation who shall violate any of the provisions of this ordinance shall be fined not less than \$100 nor more than \$500 for each offense,

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and each week of continued violation of this ordinance shall constitute a separate offense after the first prosecution has been begun.

Section 3. This ordinance shall take effect and be in force from and after the earliest period allowed by law, but shall not apply to or be operative against any owner or operator of any public gasoline or oil filling station or sales depot heretofore erected, unless two-thirds of the owners of the property for whose consent this ordinance makes provision file with the city clerk within thirty days after this ordinance takes effect their written protest against the further operation of such station or depot."

When the said ordinance became effective, the relator was the lessee, and subsequently became the owner of the real estate situated at the corner of Broad and 21st streets in the city of Columbus and had erected and was maintaining a gasoline and oil filling station on said premises.

In April of the present year, with a view to enlarging its business, the relator tore down the original buildings on the said premises and prepared plans and specifications for the erection of a more elaborate building, with rest rooms for patrons and with greatly increased storage capacity and with increased facilities and equipment for the transaction of its business.

The original plant was conducted on the said premises by means of access thereto from an alley on the rear of the said lot and from 21st street.

The plans for the proposed structure involve an additional passageway over the sidewalk on Broad street.

Counsel for defendant claims that the proposed structure should be regarded as a new structure, and would therefore fall within the scope of section one of the ordinance above referred to.

The relator contends:

- (1) That the said ordinance is unconstitutional.
- (2) That if the ordinance is found to be constitutional, that the relator is exempt, by virtue of the provisions of Section 3 of said ordinance.

We have carefully considered the unusually exhaustive and helpful briefs which have been filed by counsel. We shall not attempt to analyze or distinguish the various authorities cited therein, but will merely announce the conclusion at which we have arrived after an examination of such authorities.

We have previously considered the question of the constitutionality of section one of the ordinance in question. Since our decision in the Speice case, the Supreme Court of the United States has affirmed the celebrated bill board case of *Cusack Company v. City of Chicago*, decided January, 1917, and upheld the constitutionality of the bill board ordinance in question, which ordinance involved a principle similar to the one in controversy.

In the Speice case the validity of Section one of the ordinance in question was conceded by the court to be constitutional, and we are confirmed in that opinion by the decision of the Supreme Court of the United States in the bill board case above referred to.

This court also held in the Speice case that the ordinance should be considered prospectively, and that it did not apply to the maintenance and operation of a gasoline or oil filling plant in existence at the time the ordinance became effective.

The question now for consideration is, whether the said ordinance exempts an owner or operator of an existing business who tears down his buildings and undertakes to rebuild them with greatly increased facilities, including additional means of access to said premises and therefore including additional burdens upon the adjacent streets.

Construing Section 3 with the remainder of the ordinance, we have reached the conclusion that it was intended by said ordinance to exempt only the existing capital and business of public gasoline and oil filling stations, and to relieve the existing owner of such stations from being subjected to a possible loss of an existing investment and business.

We do not intend to hereby express an opinion as to the extent an owner of an existing property may go in the way of repairs or improvements to an existing plant without subjecting himself to the provisions of section one of said ordinance.

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We are of opinion, however, that when an owner tears down an existing structure and erects a new one with greatly increased storage capacity and equipment, with a new driveway and means of access thereto, and arranges to equip the new building with electrical displays such as are contemplated and so forth, that such person falls within section one of said ordinance.

We have carefully considered the plans, specifications and other evidence which has been presented and are of opinion that the proposed improvements do not bring the relator within the exemption provided in Section 3 of said ordinance.

In view of the conclusions above stated, it is apparent that the relator has not established a clear right to the relief sought. Peremptory writ refused.

ALLREAD and FERNEDING, JJ., concur.

INVALIDITY OF STATUTES AUTHORIZING THE LICENSING OF TRANSIENT DEALERS.

Court of Appeals for Wayne County.

H. F. EVANS V. CITY OF WOOSTER.

Decided, February Term, 1914.

Constitutional Law—Statutes Giving Authority to Compel Transient Dealers to Take Out Licenses Invalid for Indefiniteness—Reviewing Court Without Authority to Consider Validity of an Ordinance Not Incorporated in the Record.

1. A court in reviewing the decision of a mayor upon demurrer to an affidavit of complaint, involving the validity of the ordinance under which the affidavit is drawn, is not at liberty to consider the ordinance unless it has been put into the record in the trial before the mayor and has thus become a part of the bill of exceptions.
2. Sections 3673 and 3676, G. C., in so far as they purport to authorize the requirement of licenses from transient dealers as a condition of their doing business within the municipality are unconstitu-

tional and void, and ordinances based on these statutes are therefore without effect.

BY THE COURT.

The plaintiff in error was arrested on an affidavit sworn out before the mayor of the city of Wooster charging him with the violation of one of the city ordinances in that:

"On or about the 20th day of February, A. D. 1913, at the city of Wooster, county of Wayne and state of Ohio, opened up and conducted a store for the temporary sale of goods, wares and merchandise in a store-room on South Market street, in said city, which goods, wares and merchandise consisted of pianos. He, the said H. F. Evans being then and there a transient dealer in said goods, wares and merchandise without getting a license or paying a license fee so to do. Said H. F. Evans at said time and place not selling by sample only nor was he a producer offering or exposing for sale agricultural articles or products, nor a manufacturer of said goods, wares and merchandise nor were they products of his own raising, contrary to Sections 253, 254 and 255 of the Revised Ordinances of the city of Wooster, Ohio."

After certain preliminary motions and demurrers to the affidavit had been filed a trial was had before the said mayor resulting in the conviction of plaintiff in error for the offense charged, and upon such conviction he was ordered to pay a fine of \$25 and costs, and to stand committed until the fine and costs are paid. A bill of exceptions was prepared embodying the testimony that was offered before the mayor and the case was taken by a petition in error to the court of common pleas where the finding and judgment of the mayor were affirmed.

A petition in error was then filed in this court seeking to reverse the judgment of the court of common pleas and of the said mayor. No copy of the ordinance appears in the record, and it is claimed that in testing the sufficiency of the affidavit under the ordinance of the city, the court is without authority to look to the ordinance itself, or to take judicial notice of its existence, and therefore that it must be presumed that the affidavit and ordinance were sufficient to sustain the conviction. And this seems to be the law in Ohio, so held in 21 C. C., 761, which

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was afterwards affirmed by the Supreme Court of Ohio without report. But it is urged as error to this court that the statutes authorizing cities and villages to pass ordinances such as the ordinance must have been, under which this defendant was convicted, were and are unconstitutional by reason of being in conflict with the provisions of both the state and federal constitutions.

While we can not look to the ordinance itself we can look to the statute that authorizes a city or village to pass such an ordinance, and as the ordinance itself defining certain acts as offenses against the municipality can not rise higher than the source which authorizes it to be passed as part of the law of the municipality, if the statute or source from which it is derived is violative of the provisions of the Constitution, the ordinance itself must be so.

The statutes authorizing cities and villages to pass ordinances making such offenses as the plaintiff in error was charged with, punishable are Section 3673-3676 of the General Code. These sections provide that municipalities shall have the general power to license transient dealers or persons who temporarily open stores or places for the sale of goods, wares or merchandise, and in granting such license may exact and receive such sum of money as it may think expedient and delegate to the mayor thereof authority to grant, issue and revoke such licenses.

Certain exceptions are made to the authority thus given, such as that the provisions of these sections shall not apply to persons selling sample only, and excusing persons from being required to have a license to sell their own product. It is held in the 14 C. C. Rep., at page 592, in the second clause of the syllabus that the act of March 25, 1890, authorizing the licensing of transient dealers in cities and villages violated Sections 1 and 2 of the bill of rights and is therefore invalid. It was further held by the Circuit Court of Licking County that the statute authorizing the passage of an ordinance similar in its provisions and making the same acts complained of in this proceeding criminal and punishable by fine, was unconstitutional and void. This judgment of the Licking county court was afterward affirmed by the Supreme Court of Ohio. These two judgments having

been given by the circuit court of this appellate district of which this court is the successor, we feel that these decisions are the law so far as this district is concerned, and that we are bound by them and therefore bound to hold that the sections of the statute referred to authorizing the ordinance under which this prosecution is held are at least unreasonable in the authority granted, and for that reason the ordinance passed under the provisions of such statute are unauthorized and void. Further the matters and things which are held in the 14 C. C., to render the ordinance under discussion in that case void apply with equal force to any ordinance such as would authorize the prosecution of an offense such as is prosecuted in this case, that is, there is no provision either in the statute authorizing municipalities to license transient dealers and those who temporarily open stores for the sale of goods, wares and merchandise, or defining what is meant by opening a store for the temporary sale of goods, or what constitutes a transient dealer. That is, there is no limit fixed in the statute, and therefore no limit could be fixed by ordinance under the statute which defines what length of time shall constitute a temporary sale of goods or the temporary opening of a store for the sale of goods, and because these things are so held to be unconstitutional we feel that any ordinance such as the one under which this plaintiff in error was persecuted, would be an unreasonable exercise of the authority granted by the Legislature to municipalities and would therefore be void. 49 O. S., 536.

It will therefore be the judgment of this court that the judgment of the court of common pleas affirming the judgment of the Mayor of Wooster shall be reversed and the prisoner will be discharged. The defendant in error will pay the costs. Exceptions.

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**DETERMINATION AS TO WHETHER A PARTNERSHIP
EXISTED.**

Court of Appeals for Hamilton County

AUGUST HERRMANN, INDIVIDUALLY AND AS AN ALLEGED PART-
NER OF LOUIS WERK AND CHARLES E. BULTMAN, v.
E. BRUCE ROHN AND CHARLES S. GEISINGER ET AL.*

Decided, April 30, 1917.

*Partnership—Contract Which Constituted a Partnership—Notwith-
standing a Declaration that a Partnership was Not Intended—
Agreement in Writing Providing How a Possible Judgment in a
Pending Cause Against the Parties Should be Liquidated—Admis-
sible in Evidence as an Admission Against Interest.*

1. The existence of partnership liability is not affected by stipulations in the contract between the parties that no partnership relation is to exist between them, and that one of the said parties is to have the absolute control and management of the business and be liable for the debts. *Wood v. Vallette*, 7 O. S., 172, followed.
2. Where W and B enter into a contract whereby W lends B a sum of money with no stipulation for interest or repayment, B agreeing to turn over to W a percentage of the profits of his business and not to transfer the business without the consent of W and first giving him a privilege of purchase, and thereafter W actively engaged in securing credit for B and advises persons having dealings with B that he (W) is financially interested, liability for the debts of the business is incurred by W.
3. In an action against B, W and H as a partnership, upon checks of B and for money advanced to B as trustee to protect his account as broker, where partnership liability is denied by W and H and H's contract with B was oral, an agreement signed by W and H a short time before the trial, provided for payment of any judgment which might be rendered against them and division of the amount of the judgment between them and that neither should settle without the consent of the other, is admissible in evidence as an admission against interest and a circumstance tending to show that they felt equally bound.

*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, October 9, 1917.

Cogan, Williams & Ragland, for plaintiffs in error.

Victor Heintz, Geoffrey Goldsmith, Froome Morris, Littleford Hunemeyer, Bayly, Simmons & DeWitt, for defendants in error.
Charles Case and Carl Lehmann, contra.

GORMAN, J.

In the Superior Court of Cincinnati the defendants in error, Rohn and Geisinger, who were partners in Allentown, Pennsylvania, brought an action against August Herrmann, Louis Werk and Charles E. Bultman, to recover money on four causes of action set out in their petition. The first three causes of action were upon checks issued by C. E. Bultman as trustee, and the fourth cause of action was for moneys advanced to Charles E. Bultman, trustee, to protect said Bultman's account as a broker. The total amount claimed was \$13,703.43.

Upon the trial of the cause below to a jury, a verdict was returned in favor of plaintiffs and against all the defendants in the sum of \$10,425.32.

Thereupon August Herrmann prosecuted error to this court and has filed his petition in error herein, and the defendant Louis Werk has filed a cross-petition in error, each seeking to reverse and set aside the verdict and judgment which was entered thereon in the superior court. The defendant Charles E. Bultman has not prosecuted error to the judgment.

The claim of plaintiffs was that these three defendants, August Herrmann, Louis Werk and C. E. Bultman, were partners doing business as brokers under the name of C. E. Bultman. A great mass of evidence was heard in the court below, and the cause having been fully considered by the court a motion to set aside the verdict was overruled and judgment entered thereon against all of the defendants.

It is claimed by plaintiff in error Herrmann: first, that there is not sufficient evidence in the record to show that he was a partner of Bultman; second, that the verdict is against the weight of the evidence; and, third, it is claimed that there was error in the admission of evidence and in the charge of the court and the failure to give certain special charges.

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An examination of the record satisfies us that there was sufficient evidence to submit this case to the jury so far as Herrmann is concerned. As to the defendant in error, Louis Werk, we think that it is established by a preponderance of the evidence that Werk was a partner of Bultman.

It appeared upon the trial that Louis Werk had entered into a written agreement with Charles E. Bultman on or about the 10th day of June, 1914, and we think the evidence warranted the jury in finding that Herrmann had entered into a similar contract at the same time with Bultman, although the evidence fails to show that Herrmann's contract was in writing. This contract in substance provided that Werk was to loan \$10,000 to Bultman. There was no time stipulated when this money was to be repaid or returned; no evidence of indebtedness taken; no interest to be paid upon the loan; nor was there any promise, whatsoever to repay the money. In the agreement the parties stipulated that they were not to be partners. It was further agreed that Werk was not to be liable for any of the debts of the business, but that the business should be conducted by Bultman, and that he should have absolute control of the management thereof and be liable for all the debts. It was further stipulated that Bultman was not to transfer his business to any one without first obtaining the consent of Werk; and that Werk should have the first privilege of purchasing the business. It was further stipulated that Werk was to receive fifteen per cent. out of the profits of the business. After the business was opened up, both Werk and Herrmann took an active part in securing credit for Bultman and in advising persons who had dealings with Bultman that they were financially interested. Bultman at their request employed a friend of Herrman and Werk, who remained in the office of Bultman and was paid by Bultman, but who, as Bultman expressed it, was the most expensive piece of bric-a-brac he ever had about the office. This man made reports to Herrmann and to Werk as to the manner in which the business was conducted by Bultman. While the evidence does not disclose that Herrmann ever signed any written agreement such as did Werk, it is in evidence that Herrmann agreed orally to sign a similar agreement.

Both Herrmann and Werk advanced the amount of money which each agreed to advance, and it can not be doubted, we think, that the evidence adduced was sufficient to warrant the jury in returning a verdict against both Herrmann and Werk as well as against Bultman.

However this may be, we can not say that the verdict is so manifestly against the weight of the evidence as to require us to set aside the judgment and return the cause to the superior court for a new trial. The trial court heard the evidence, saw the witnesses face to face, observed their demeanor and their conduct. The jury also had the same opportunity as the trial court. They returned this verdict and the trial court refused to set it aside upon the ground that it was manifestly against the weight of the evidence, or upon the ground that there was insufficient evidence. A reviewing court under such circumstances should hesitate to set aside a verdict and judgment on the ground that the same is against the weight of the evidence.

Notwithstanding the fact that both Herrmann and Werk testified that they did not intend to be partners, and notwithstanding the fact that in Werk's agreement and in the agreement which Herrmann was to sign—if he did not sign it—they were not to be partners, the question as to the partnership was not to be determined by their declarations.

It was held in *Wood v. Vallette*, 7 O. S., 172, that notwithstanding the fact that the parties stipulated they were not to be partners, the question as to the partnership was to be determined by the acts and conduct and the agreements of the parties.

The case of *Wood v. Vallette*, *supra*, was under consideration in the later case of *Harvey v. Childs*, 28 O. S., 319, and in that case the court distinguished the case of *Wood v. Vallette* from the case that was under consideration. The case of *Harvey v. Childs* was a single transaction and not involving a series of transactions or a business enterprise. But the case of *Wood v. Vallette* was approved in *Harvey v. Childs*.

It was also held in the case of *Cox v. Hickman*, 99 E. C. L., 27, decided by the House of Lords, that a partnership could be implied in law by the acts and conduct of the parties, and the

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agreements entered into by them, notwithstanding the fact they had stipulated they were not to be partners.

In the case at bar there is no question but that Bultman was authorized to act for Werk and Herrmann. Their agreement was that they were to participate in the profits. The advancement of the money which each was to make to Bultman does not bear any of the ear-marks of a loan, but has the characteristic indicia of advancements in the business.

As was well said in the case of *Beecher v. Busch*, 45 Mich., 189:

“It is nevertheless possible for parties to intend no partnership and yet to form one. If they agree upon an arrangement which is a partnership in fact, it is of no importance that they call it something else, or that they even expressly declare that they are not to be partners.”

This statement of the law is in line with the rule laid down in *Wood v. Vallette*, *supra*.

It is objected by counsel for Herrmann that a certain agreement entered into between Werk and Herrmann, three days before the case was tried in the court below, was improperly admitted in evidence. This agreement was in writing, signed by Herrmann and Werk, and in substance provided that in the litigation pending against Herrmann and Werk in the Superior Court of Cincinnati, if a judgment should be rendered against either or both, or it should be necessary to pay any claims in those actions, Herrmann would pay all sums up to \$10,000 with interest, that being the amount which Werk had contributed as a loan to Bultman; and for all sums above \$10,000 and interest, each of the parties, Herrmann and Werk, would be liable and pay in equal proportions or fifty per cent. thereof. The parties further agreed not to settle or compromise any suits or claims involved in said litigation without the consent of the other. Each of the parties agreed to furnish his own attorney to defend the actions and the claims, and to pay one-half of the costs and expenses, if any.

We think this paper was admissible in evidence against both Herrmann and Werk, as admissions against interest and cir-

circumstances tending to show that they both felt equally bound, each for one-half of any judgment that might be rendered against either.

Upon a careful consideration of the entire case and the record, we have come to the conclusion that there is no error in the record prejudicial to either plaintiff in error or the cross-petitioner in error, Louis Werk. It appears to us that substantial justice was done by the court and jury in the trial below, and the judgment is therefore affirmed.

JONES, P. J., and HAMILTON, J., concur.

**DETERMINATION AS TO LIABILITY FOR AN
AUTOMOBILE ACCIDENT.**

Court of Appeals for Crawford County.

QUEENIE PLACE, BY BERT E. PLACE, GUARDIAN, v.
LEWIS H. BERRY.

Decided, December 1, 1916.

*Negligence—As Between Two Occupants of an Automobile in Collision
With Another Machine—Where there Are Two Plausible Theories
of an Accident the One Adopted by the Jury Will be Upheld.*

A young lady accompanied by her escort, both of whom were minors, rode to the next county seat in an automobile belonging to the girl's father. For a time the car was run by her, but during the journey its operation was surrendered by her to the young man. As they approached their destination their machine collided with another automobile, causing injury to the plaintiff below. The mechanism of the car was such that either of its occupants could have stopped it without changing position, had ordinary care been exercised. The jury found in favor of the young man, and assessed damages against the young lady. *Held:*

That while it would have been competent for the jury to have found the couple were engaged in a joint enterprise, yet the theory that, at the time of the accident, the young man was operating the car as the agent of his companion is tenable, and the rule

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that all reasonable presumptions should be indulged in favor of the validity of the judgment requires that it be affirmed.

H. R. Schuler and C. E. McBride, for plaintiff in error.
William C. Beer, contra.

BY THE COURT (Crow, Kinder and Robinson, JJ.).

Plaintiff's action in the court of common pleas, which resulted in a verdict and judgment thereon in the amount of \$1,500, was for personal injuries sustained by him from contact with an automobile occupied at the time by plaintiff in error, Quenie Place, who was a defendant below with Bert E. Place, who was her father, and one Paul D. Sweney.

In an early stage of the action it was dismissed as to the defendant Bert E. Place.

On the trial, verdict and judgment were rendered in favor of Paul D. Sweney.

The undisputed evidence shows that Queenie Place and Paul D. Sweney, both of whom were minors, started in an automobile owned by the young lady's father, the said Bert E. Place, for a drive which commenced in Galion. Miss Place was operating, the car at the time they started from Galion, but on the trip to Bucyrus, where plaintiff's injuries occurred, she gave over the operation of the car to Mr. Sweney, who continued to drive until they reached the latter city and until after plaintiff sustained his injuries. At a point in Bucyrus just off the public square the car struck plaintiff below and carried him some distance until it collided with the rear of another automobile standing ahead of it in the street.

The evidence introduced in behalf of plaintiff below tends to show that the position of Miss Place at the side of Mr. Sweney was such that by the exercise of ordinary care she could, because of the mechanism with which the car was provided, have caused it to stop in time to have avoided colliding with the standing car.

Plaintiff's evidence also tends to show that by the exercise of due care on the part of Mr. Sweney, he could have stopped the

car before the collision, not only by turning the switch, but also by the application of a brake, neither of which he attempted to do.

While the theory of counsel on behalf of defendant in error is that the liability, if any, of Queenie Place arose from her negligence in failing to personally exercise the claimed requisite care to avoid the injury to plaintiff below, and while that contention is not without support, the province of the court in reviewing the case is, of course, not limited to such consideration.

All reasonable presumptions in favor of the judgment's validity must be indulged, and if upon any proper view the record is in such state as to sustain the verdict and judgment, the latter must be affirmed.

Under all the circumstances, Miss Place and Mr. Sweney could, by the jury have been found to have been engaged in a joint enterprise, in which status each would be answerable for the tortious acts of the other. *Sherman & Redfield's Law of Negligence*, Sixth Edition, page 317; 57 L. R. A. (N. S.), 436-439, and cases cited in note.

Another view of the transaction is worthy of consideration, namely, that the jury may have concluded that Mr. Sweney was the agent of Miss Place at the time of the injury. And it can not be said that such conclusion is entirely without warrant. Assuming Miss Place to have been in rightful possession of the car, Mr. Sweney was either her agent in its operation or voluntarily assumed with her the management of the car, or wholly superseded her in its operation. If the latter, then the contention of the plaintiff that she was personally negligent when she saw the position of peril of plaintiff below, which his evidence tended to show she saw or could have seen, and failed to exercise due care, would be correct.

The consistent view, inasmuch as the jury found in favor of Mr. Sweney, is that they regarded him as the agent of Miss Place at the time plaintiff received his injuries.

Counsel for plaintiff in error argue that, upon that theory, the judgment should be reversed because Mr. Sweney was not a proper party.

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So far as that contention affects plaintiff below it is a sufficient answer, that she can not in the first instance raise it in the reviewing court. The proper practice is that employed in the case of 76 Ohio State, 509.

Numerous reasons are urged for reversal of the judgment. All have been examined, and none found of such character as to afford that relief to plaintiff in error.

The charge is not wholly free from inaccuracies. Much might have been omitted, and the jury left adequately informed of the issues and their duty in respect to them. But the charge does sufficiently set forth the various material questions for the jury's determination, and does also adequately inform them of the rights and liabilities of the parties to the suit, and does fully acquaint them respecting their province. Possessing these attributes, and containing nothing prejudicially erroneous, the charge can not be deemed an improper one.

If the duty rested on this court to determine the facts, it might not have done so as did the jury. But the court's duty is to *review* and to reverse only where there is error substantially affecting a right of the complaining party. The record is not in that condition, and consequently the judgment must be affirmed.

AS TO WHETHER A WILL WAS SIGNED AT THE END.

Court of Appeals for Madison County.

ALICE C. CHANDLER ET AL V. MINNIE DOCKMAN ET AL.

Decided, December 5, 1917.

Wills—Pages so Put Together as to Place the Sheet Containing the Testimonium Clause on Top—Orderly Construction Shown by Shifting the Sheets and Instrument Held Valid.

Where a will, written on two sheets of paper, is so pinned together as to put the sheet containing the testimonium clause on top and the sheet manifestly intended as the first page on the bottom, but by reading the last page first and the first page last continuity and

an orderly construction of the instrument is shown, it should be treated as signed at the end as required by law, and not as invalid because of the evident mistake in fastening the sheets together.

Murray & Emery, for plaintiffs in error.

C. R. Hornbeck and Huggins, Pretzman & Davies, contra.

KUNKLE, J.

This is a proceeding to contest the will of Harriett Stouffer, deceased. The will consists of two typewritten sheets of paper, which were fastened together by brads or paper fasteners.

This instrument was presented to the Probate Court of Madison County, and an application was made to probate the same as the valid last will and testament of Harriett Stouffer. The probate court refused to probate the same. An appeal from the judgment of the probate court was taken to the court of common pleas and that court admitted the will to probate as being the valid last will and testament of the said Harriett Stouffer.

Plaintiffs in error then filed a petition in the Common Pleas Court of Madison County to contest the said will. The case was submitted to the court upon the pleadings and an agreed statement of facts. Upon the undisputed facts, the trial court instructed the jury to return a verdict finding that the said instrument was the valid last will and testament of said deceased. From such judgment, error is prosecuted to this court.

In brief, it is contended that the instrument in question is not the valid last will and testament of said deceased because the same is not signed at the end thereof, as required by Section 10505, General Code.

This contention is based upon the fact that the signature of the testator and of the attesting witnesses is upon the first or upper page as the sheets are fastened together.

The following is a copy of said will as it appears in the record, marked Exhibit No. 1, namely:

(Top Page.)

"Fift, I hereby appoint my husband, Abram J. Stauffer and J. R. Woods of Plain City, Madison County, Ohio, as Sole Executors of this, my last Will and testament.

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"In Witness whereof, I hereunto set my hand at Plain City, County of Madison, this 12th day of June 1914.

"HARRIETT STOUFFER.

"Signed and Sealed by said Harriett Stauffer, who at the same time published and declared the same, as and for her last will and Testament, in the presence of us, who, in her presence, and in the presence of each other, and at her request, have hereto Subscribed our names as witnesses.

"JOHN H. SHULTZ.

"JOS. NUNAMAKER."

(Bottom Page.)

"The last will and testament of Harriet Stouffer?

"In the Name of the benevolent Father of all.

"I, Harriet Stouffer of the village of Plain City, County of Madison, in the State of Ohio, being in good health of body, and of sound and Disposing mind and memory, and being desirous of settling my worldly Affairs while i have strenght and capacity so to do, do make, publish, and declare this my last will and testament.

"First. I give and bequeth to my beloved husband, Abram J. Stouffer, all my real Estate and personal Property that i may possess at my dead in fee Simple, and at his head if there is any left to be distributed as follows to-wit, to my sister Marry Bowers, the sum of One Dollar, to my Neisses Effie Converse, Allice Chandler, Roby Beach and Charles Guy the Sum of one dollar each.

"To Minnie Dockman and Ettie Dockman two hundred Dollars each.

"To the Presbytereian Church of Plain City, Two Hundred Dollars.

"Second. It is my wish that wen the above bequeths are paid that my Executors herein after named shall see that John Guy my Brother if in need shall hold in trust for him whatever they may deem sufficient for his wants before any distribution is made of the remainder of my estate that may be left at the death of my Husband Abram J Stauffer,

"Third. Whatever property both personal or real that may be left after Clouse first and Second in this will has been complied with shall be devided as follows, to-wit, to Ellen Shank the one Eight of the estate Left, to Marry Ann McKinneys Children, one Eight, Thurman Guy one third and to Rhoda Fraham and her Heirs Two Thirds?

"Fourth. If any of the witnin named Parties herein should become dissatisfied with the distribution made by me or attempt

by law or otherwise to set this will aside, they shall forfeit all rights to share there under and their interest whatever it may be shall revert to the other Heirs herein mentioned."

It clearly appears from an inspection of the original will that the lower or second sheet as fastened together was intended to be the first part of the will and that the first or upper sheet as fastened together was intended to be the concluding portion of the will.

The lower or second sheet of the will begins as follows:

"The last will and testament of Harriet Stouffer?

"In the Name of the benevelant Father of all.

"I, Harriet Stouffer of the village of Plain City," etc.

This instrument then proceeds with regular continuity down to the bottom of said page and ends with paragraph No. 4, and commences at the top of the first or upper page with paragraph No. 5 and proceeds with regular continuity down to the testimonium clause thereof, which was clearly intended to be the end of the will.

The signature of the testator immediately follows such testimonium clause.

The attestation clause appears to the left of the testator's signature upon said sheet and is immediately followed by the signatures of the subscribing witnesses.

A careful examination of the will convinces us that the end of the will, within the meaning of Section 10505 of the General Code, is the blank line evidently intended for signature immediately following the testimonium clause. This is the place at which the will in question is signed.

We think this holding is not inconsistent, but in harmony with the rule announced by our Supreme Court in 71 O. S., 395; 77 O. S., 104, and 80 O. S., 691.

In the case of *Irwin v. Jacques*, 71 O. S., p. 395, Judge Price, in announcing the decision, says:

"There should be some continuity in the expression of the testator's wishes, and if a part of the will is aside from the con-

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tinuity of the language, such as the marginal matter in this case, there should be some word or character used as reference to the place it should occupy in relation to the other provisions, so that the end of the will may be ascertained."

Under the rule of continuity of expression so announced, we think the beginning and end of this will can be definitely fixed by an examination of the context.

In the Sears case, 77 O. S., 104, the court in substance held: That the end of the will was the blank line for signature immediately following the testimonium clause, and the will in that case was held invalid because the testator did not sign at such place, but wrote her name as a part of the testative clause immediately following.

In the Mader case, 80 O. S., 699, the will was held valid, where the testator signed upon the blank line immediately following the testimonium clause, notwithstanding the fact that there was a considerable blank space between the testimonium clause and the dispositive part of the will.

In this case, Judge Crew, among other things, employs the following language:

"While the leaving of a blank space such as found in this will was imprudent in that it afforded an opportunity for fraudulent practice, nevertheless, the leaving of such blank is not of itself sufficient to invalidate the will. By usage and custom, in every orderly constructed will, the testimonium clause is universally recognized and adopted as the formal conclusion and end of such will, unless from the instrument itself a contrary intent appears." * * *

In the case of Stinson's estate, 228 Pennsylvania, p. 475, the court, commencing at the bottom of page 477, states:

"His written declaration is his *animus testandi*; when it is fully expressed his will is finished and the end of it reached. It is there that his signature must appear as evidence that it is his will. What he regards as the end of his will and that must manifestly be regarded as the end of it from an inspection and reading of the writing is the end of it under the statute, which contains nothing about the spacial or physical end of it."

Brand v. Murray.

[28 O.C.A.]

From a careful consideration of the authorities pertinent to this issue and of the instrument in question, we have reached the conclusion that the instrument under consideration was signed by the testatrix at the end thereof, and that the trial court upon the undisputed facts correctly instructed the jury to return a verdict in favor of the validity of the will.

Finding no prejudicial error in the record, the judgment of the lower court will be affirmed.

ALLREAD, J., and FERNEDING, J., concur.

**AUTHORITY OF JUSTICE OF THE PEACE TO GRANT
A NEW TRIAL.**

Court of Appeals for Lucas County.

ADOLPH BRAND V. MICHAEL MURRAY ET AL.

Decided, June 7, 1916.

Justice of the Peace—Exemptions to the Overruling of a Motion for a New Trial Not Based on Statutory Grounds.

The authority of a justice of the peace to grant a new trial is not limited to the grounds named in Section 10352, General Code, but since the amendment in 1902 of Section 6565, Revised Statutes, as now contained in Section 10361, General Code, a justice of the peace may also grant a new trial on the grounds named in that section.

C. S. Curtis, for plaintiff in error.

Lawton & Saalfeld and *J. I. O'Connor*, contra.

CHITTENDEN, J.

Application for rehearing of motion to strike bill of exceptions from the files.

This cause is being considered on an application for rehearing of a motion to strike from the files the bill of exceptions for the reason that the same was not signed within the time required by statute. The cause was tried before a justice of the peace

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who rendered a decision and entered judgment on the 7th day of December, 1915. On the 10th day of December, 1915, a motion for a new trial was filed. The hearing on this motion was adjourned from time to time, and the motion was heard on December 20, 1915, and was overruled, exceptions noted and ten days allowed for the filing of a bill of exceptions. The bill of exceptions was signed and filed on December 29, 1915. The motion for a new trial was based upon several grounds, among others, that the judgment rendered is contrary to law, that it is not sustained by sufficient evidence, and because of error in the admission of evidence.

It is contended by defendants in error that the exceptions should have been prepared, allowed and signed within ten days from the entering of the judgment, and that the motion for a new trial filed by the defendant below, not being based upon statutory grounds, can not operate to extend the time for the signing of such bill of exceptions. It is contended that the authority of a justice of the peace to grant a new trial is limited by the terms of Section 10352, General Code, which, in substance, provides that a new trial may be granted when the justice is satisfied that the verdict was obtained by fraud, partiality or undue means, and that the causes mentioned are the only grounds for a new trial, and apply only when the case is tried by a jury.

Reliance is had upon the case of *Thompson v. Ackerman*, 21 C. C., 740, and that decision does sustain the proposition contended for by defendants in error. That decision was rendered in 1901 when there were no grounds for a new trial except those contained in Section 6560, Revised Statutes, now Section 10352, General Code. At the time of that decision Section 6565, Revised Statutes, now Sections 10360, 10361, 10362 and 10363, General Code, was in the form found in 93 O. L., 104. Section 6565, Revised Statutes as there enacted, referred to no grounds for a new trial in addition or supplemental to Section 6560, Revised Statutes, and the same situation is true in relation to the decision of the Supreme Court in the *State v. Langenstroer*, 67 O. S., 7, the facts in the latter case bringing it under the act found in 93 O. L., 104.

In 1902 Section 6565, Revised Statutes, was amended, and by the terms of the amendment additional grounds for a new trial were incorporated therein, as found in Section 10361, General Code, its provisions now being that if the "exception is to the decision of the court, on a motion to direct a non-suit or to arrest the testimony from the jury, or for a new trial because the verdict, or if the jury is waived, the finding of the court is against the law and the evidence, or on the admission or rejection of evidence, the party excepting must reduce his exceptions to writing" and present them to the trial justice within the time limited by the same section (now Section 10360, General Code), which is within "ten days from the date of overruling the motion for a new trial," if such motion be made, etc. It will be seen that a radical change in the terms of Section 6565, R. S., was made by this amendment, and that the decisions cited by defendants in error were rendered with reference to the law as it stood before the amendment. The wording of the section as now found in the General Code is, we think, plain and unambiguous, and we hold that the bill of exceptions was filed within the time provided by statute.

The application for rehearing will be denied.

RICHARDS, J., and KINKADE, J., concur.

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**LEGAL EFFECT OF LANGUAGE USED IN A DEED NAMING THE
USE TO BE MADE OF THE PROPERTY.**

Court of Appeals for Wayne County.

JOHN FAWCETT LARWILL ET AL V. JOHN P. FARRELLY.

Decided, March 22, 1918.

*Deeds—Declaration as to Purpose of the Grant Without Effect, Unless—
Presumption that the Whole Title Passed—Conditions Lessening
the Estate Conveyed Must be Strictly Construed.*

The use in a deed of general warranty of the words, "for the use and sole benefit of the Catholic church and such other erections as may be needed for the use of the said Catholic church," does not constitute a condition subsequent or engraft a limitation upon the title, but at most is a mere suggestion or unenforcible request or desire.

*L. R. Critchfield, Sr., and A. D. Metz, for plaintiffs in error.
John McSweeney and M. P. Mooney, contra.*

HOUCK, J.

Proceedings in error.

The error complained of in this case is in quieting the title to certain real estate located in the city of Wooster, Ohio, claimed to be owned in fee simple by the defendant in error here, who was the plaintiff below.

The trial judge in the common pleas court granted to the said Farrelly all the relief prayed for in his petition, thereby holding that John Fawcett Larwill and the other defendants below, the plaintiffs in error here, had no interest either legal or equitable in and to the real estate in question.

The contention in this lawsuit is as to the legal effect of the following words, "for the use and sole purpose of the Catholic church and such other erections as may be needed for the use of said Catholic church."

This language appears in the granting clause of a deed made on the 27th day of May, 1857, by Joseph H. Larwill and his wife, Nancy Q., to the Reverend Amadeus Rappe and others. These

grantees and all subsequent grantees by a series of deeds conveyed all their interest in and to said lands described in the said Larwill deed to the said John P. Farrelly, who is now in possession of same, claiming to be the owner thereof in fee simple.

The granting clause in the Larwill-Rappe deed reads:

"That the said Joseph H. Larwill and Nancy Q. Larwill, his wife, for and in consideration of the just sum of \$1,100 in hand paid, the receipt whereof we do hereby acknowledge, have given, granted, bargained, sold, released and conveyed, and do by these presents give, grant, bargain, sell, release, convey and confirm unto the said Reverend Amadeus Rappe, Frederick Buchholtz and Michael Carroll, and their heirs and assigns forever, for the use and sole purpose of the Catholic church and such other erections as may be needed for the use of said Catholic church, a certain tract or parcel of land situate in said Wayne county, and described as follows:" (Here the premises are described.)

The habendum clause reads:

"To have and to hold the said described premises hereby sold as aforesaid, or meant or intended so to be, with all the privileges and appurtenances thereunto belonging or in any wise pertaining unto the said Amadeus Rappe and Frederick Buchholtz and Michael Carroll, and unto their heirs and assigns forever, for the sole use and benefit of said Catholic church and said other erections as aforesaid, and the said Joseph H. Larwill and Nancy Q. Larwill, his wife, for themselves and for their heirs, executors, and administrators, do covenant, promise and agree to and with the said Reverend Amadeus Rappe and Frederick Buchholtz and Michael Carroll, their heirs and assigns, that they, the said Joseph H. Larwill and Nancy Q. Larwill, his wife, are lawfully seized of the premises aforesaid, and that the said premises are free and clear of and from all encumbrances whatever, and further that the said Joseph H. Larwill and Nancy Q. Larwill, his wife, will well and truly warrant and forever defend the premises herein and hereby granted unto the said Reverend Amadeus Rappe and Frederick Buchholtz and Michael Carroll, and to their heirs and assigns, from the lawful claims and demands of all and every person whomsoever."

The conceded facts are that the property described in said deed is not used by the Catholic church for church purposes, but its use for same has entirely ceased. That Joseph H. Larwill and

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Nancy Q. Larwill, his wife, have departed this life, and that the plaintiffs in error are their only surviving heirs at law.

The proper solution of one question will determine the rights of the parties to this controversy, namely: What is the legal effect, as used in said deed, of the language, "for the use and sole purpose of the Catholic church and such other erections as may be needed for the use of said Catholic church," and, does it constitute a condition subsequent?

A condition will not be raised by implication from a mere declaration contained in an instrument that the grant is made for a particular or certain purpose, unless it is coupled with words clearly showing upon their face such a condition.

In a warranty deed, such as the one now before us for construction, which contains the usual words of warranty and alienation of title of grantors, the law presumes that all of the grantor's title and interest in the real estate described in said instrument passes to the grantee, unless by some plain language used therein the contrary is shown.

Conditions which in any way have a tendency to destroy or lessen estates are not favored by the law, and thus are strictly construed, and all doubts are resolved against restrictions.

While it is true that no precise form of words is necessary or essential to create a condition subsequent, nevertheless it must be created if in a deed by such terms as to leave no doubt of the intentions of the grantor so to do.

The language used by the grantors in the deed in the case at bar is clear, plain and unambiguous, and there is no doubt about its meaning, but as we interpret and construe it, falls far short of being sufficient to create a condition subsequent.

So far as creating limitations upon the title conveyed, it certainly does not. In legal effect it has no force, and the most that can be claimed for it is that it might be construed as a mere wish or desire on the part of the grantors to have the property used for the purposes indicated by the language; but in effect it is a mere suggestion, an unenforceable request or desire.

An examination of the deed nowhere discloses any language that could be construed as intended to create any limitation upon

the fee simple title in the grantees, their heirs and assigns, and we find no reservations or limitations contained in said deed.

It is generally known that when an estate granted is intended to be terminated or forfeited that certain terms are used in the granting clause, or somewhere in the deed, declaring that the estate conveyed is to be forfeited "in the event that" certain conditions are not complied with. But in the deed now before us there is an utter absence of any such provisions.

Courts, in construing deeds and like written instruments, must be guided by the intention of the parties to them, and this must be determined by the language used in the instrument, the question being not what the parties meant to say, but the meaning of what they did say, as courts can not put words into an instrument which the parties themselves failed to do.

The deed in this case is regular upon its face. It conveys certain lands, for a valuable consideration, to the grantees, their heirs and assigns forever, and warrants the title to same against the claims of all others. It contains no words of forfeiture or limitation, nor is there any provision for re-entry. Thus it follows that the mere fact that the present owner of the lands has ceased to use same "for the use and sole purpose of the Catholic church," etc., would not in law vest the plaintiffs in error with the title to said real estate.

It follows from what we have already said that the judgment below is right. We have examined all of the alleged errors, as claimed by plaintiffs in error, and we find none of them of that substantial nature as would warrant a reversal of the judgment below.

The judgment of the common pleas court is affirmed and the case is remanded to that court for execution.

POWELL, J., and SHIELDS, J., concur.

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**STATUS OF UNBORN CHILD NOT AFFECTED BY DIVORCE
OF ITS PARENTS.**

Court of Appeals for Greene County.

REAMY A. WILSON V. DE ETTA WILSON ET AL.

Decided, November, 1917.

*Descent—Not Bastardized Thereby—But Becomes an Heir to His
Father's Estate—May Sue to Contest His Father's Will—Plea in
Abatement in a Will Contest.*

1. The legitimacy of a child is not affected by the fact that it was begotten before the marriage and born after the divorce of its parents, and such a child is, therefore, an heir-at-law of its father and as such has an interest in the contest of his father's will.
2. Notwithstanding all the defendants have answered to the merits in an action to contest a will, a motion in the nature of a plea in abatement, denying the heirship of plaintiff and his interest in the subject-matter of the suit, is properly determinable before the issue as to the validity of the will is submitted.

Marcus Shoup and W. L. Miller, for plaintiff in error.

M. J. Hartley and C. L. Darlington, contra.

KUNKLE, J.

Plaintiff in error (plaintiff in the lower court) brings an action to contest the will of William M. Wilson.

Plaintiff in error claims that he is the only child and heir at law of said William M. Wilson.

The legatees, devisees and the executor named in the said will are made parties defendant in this case.

Defendants below filed an answer consisting of a general denial of all the facts contained in the petition except as to the death of William M. Wilson; the fact that he left surviving him his wife, De Etta Wilson; that his will has been duly proved as such; that the said De Etta Wilson is his executrix and that the persons named in the petition are devisees and legatees thereunder.

Subsequent to the filing of said answer, two of the defendants, namely, Nellie VanHorn Moorehead and Mary VanHorn Smith Dare, filed a plea in abatement in which they deny that plaintiff in error is a child or heir at law of William M. Wilson, deceased, and further state that the plaintiff in error is not related to said William M. Wilson, and has no interest whatever in the subject-matter of the suit.

Thereupon the case came on for hearing upon the said plea in abatement, and was submitted to the court upon such plea and the evidence.

The trial court found that the plaintiff in error was not an heir at law of William M. Wilson, deceased, and had no interest in his estate and had no right to maintain this action.

The plea in abatement was therefore sustained and the petition dismissed.

From such judgment, plaintiff in error prosecutes error to this court.

We have carefully read the record in this case and considered the various authorities cited in the briefs of counsel. We shall not, however, attempt to discuss either the evidence or the authorities in detail, but will merely announce the conclusion at which we have arrived after a careful examination of the record and authorities cited.

In brief, however, it appears from the record that the said William M. Wilson was married to Ida J. Dawes on January 10, 1876, at Logansport, Indiana; that at the time of said marriage, the said Ida J. Dawes was pregnant and that a child was born to her June 23, 1876, at Cincinnati, Ohio.

The testimony tends to show that shortly prior to the marriage of the said William M. Wilson and Ida J. Dawes the said Wilson attempted to induce Ida J. Dawes to go to Dayton, Ohio, for the purpose of having an abortion committed, and that her refusal to do so angered the said Wilson; that he did induce her, however, to go to Cincinnati for the same purpose; that she went to the hospital of Dr. Reamy at Cincinnati, where the said Wilson had arranged for her treatment. The record discloses that in the meantime the family of Ida J. Dawes became alarmed and

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sought out the said William M. Wilson and demanded that he disclose the whereabouts of the said Ida J. Dawes.

It appears that as a result of these efforts, Ida J. Dawes was brought back to Logansport, Indiana, the home of herself and also of the said Wilson.

A family conference was held with the said Wilson, which resulted in his agreeing to marry the said Ida J. Dawes. The mother of Ida J. Dawes insisted upon the marriage for the purpose of giving the expected child a name. The following appears on page 5 of the record, namely:

"He (meaning the said Wilson) said he would marry her but he would not live with her. He wasn't going to be disgraced and would not have this thing made public but he would marry her. And my mother said she simply asked for a name for the child. He was willing and brought his license and the minister—an Episcopal minister."

The marriage ceremony was performed at the home of Ida J. Dawes in the presence of members of her family and John C. Nelson, a friend of the said Wilson, the said Nelson, who testifies in this case, being invited by Mr. Wilson to accompany him.

Immediately after the marriage, the testator left his said wife and did not subsequently live with her.

Shortly after the marriage of the said parties and before the birth of the said child, the said parties were divorced by the Circuit Court of Cass County, Indiana. The wife secured the divorce and also an allowance for alimony.

In her complaint for divorce she asked for alimony for the support of herself and to pay the expenses of her expected sickness and also asked for the custody of her unborn child.

The court found the facts stated in the complaint to be true; granted the divorce; awarded her alimony and also the custody of the unborn child.

Among other things, it is urged by counsel for plaintiff in error that the trial court erred in hearing and considering the special plea in abatement which was filed by two of the defendants after they had joined with the other defendants in filing an answer to the merits of the case.

Counsel for plaintiff in error concede that their client's right to maintain an action to contest the will may be properly raised and determined on a motion in the nature of a plea in abatement but they insist that such plea was waived in the case at bar by reason of the fact that all of the defendants filed an answer to the merits of the case.

In a suit to contest a will, the statute requires that an issue be made up and tried as to whether the paper writing in question is or is not the valid last will and testament of the testator. This, therefore, is the only issue contemplated in the final submission of the case to the jury.

The question of plaintiff's interest or right to maintain the suit should therefore be made by a special plea and should be tried and determined before the trial upon the issue as to the validity of the will. The answer which was filed in this case is in substance a general denial and is therefore not inconsistent with a plea in abatement for the reason that such plea also denies the allegations of the petition as to the heirship of plaintiff in error.

If the plaintiff in error is not an heir of the decedent, then he has no interest in the subject-matter and can not maintain this action.

We think the trial court properly heard the case upon the plea in abatement.

Upon the question of the heirship of plaintiff in error, after a careful consideration of the record and especially of the acts and the conduct of the said William M. Wilson, we are of opinion that the evidence establishes the fact that the said William M. Wilson was the father of plaintiff in error and that the marriage in question, under the circumstances, disclosed by the record, was an acknowledgment upon the part of William M. Wilson of the paternity of this child.

Upon the marriage of the said Wilson and Ida J. Dawes, the unborn child became legitimate and was capable of inheriting from the father under the common law.

In the case of *Miller v. Anderson*, 43 Ohio St., 473, the opinion of Judge Atherton contains a general discussion of the common law rule in respect to the legitimacy of children.

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We think this discussion applies to heirship and the right of inheritance, although the issue in that case was limited to proceedings under the bastardy statutes..

Among the authorities discussed by Judge Atherton in the decision above referred to is the case reported in *Tioga Co. v. South Creek (Tp.)* 75 Pa. St., 453, in which the following language is used:

“That the parents should be permitted to bastardize the child is a proposition which shocks our sense of right and decency and hence the rule of law forbids it.”

Further mention is also made by Judge Atherton of the following rule, viz:

“This doctrine is recognized in *Parker v. Way*, 15 N. H., 45; *Davis v. Houston*, 2 Yeates (Pa.), 289; *Page v. Dennison*, 1 Grants Cases, 377; S. C., 29 Pa. St., 420, in which case the court in addition hold that: ‘Whether the child is begotten in or out of wedlock, if marriage precedes the birth, the presumption of paternity is the same, and it can only be bastardized by proof of non access.’ ”

There is also discussed in this decision the case of *State v. Romaine*, 58 Iowa, 46, 48, wherein the rule is announced that:

“If a woman be pregnant at the time of the marriage and if pregnancy be known to the husband, he should be conclusively presumed to be the father.”

Reference is also made therein to the case of *State v. Herman*, 35 N. C. (13 Ired.), 502, wherein the Supreme Court of North Carolina holds, that:

“A child born in wedlock, though born within a month or day after marriage, is legitimate by presumption of law and where the mother was visably pregnant at the marriage it is a presumption *Juris et de jure* that the child was the offspring of the husband.”

Without further citing authorities, we think the rules above announced are well established.

Under the common law, the child was considered as being in legal existence and capable of inheriting as a legitimate child from the date of the marriage between the natural father and mother, irrespective of the shortness of the time of the birth of the child after such marriage.

If the unborn child is legitimized by the act of marriage, then in our opinion the child can not thereafter be bastardized nor rendered illegitimate by any subsequent act of either of its parents.

It is in effect conceded by counsel for defendants in error that if the decree for divorce between the father and mother of this child had been withheld until after the birth of the said child, that the child would then be legitimate as it would have been born during actual wedlock.

Under the statutes of our state, as well as at common law, we are of opinion that a decree for divorce between the parties does not effect the status of children. We think this rule would include children *en ventre* as well as those actually born.

It appears from the record that the decree for the divorce in question does not undertake to bastardize the unborn child, but recognizes it as a feature of the marriage and fixes its custody.

The law favors the legitimacy of children and it would be a harsh rule which would permit a decree for divorce between the parents to so operate as to bastardize an unborn child which would be considered legitimate had the entry of divorce been withheld a day, a week, or for any period of time after the birth of the child.

We think a holding to the effect that a decree for divorce can operate to change the status of an unborn child is contrary to the humane policy of the law.

We have considered this case as one arising under the Ohio law for the reason that the law of Indiana, to which reference is made, is not plead nor proven, and the presumption is that the law of the forum controls the rights of the parties. *Erie Ry. v. Welsh*, 89 Ohio St., 81; *Coffinberry v. Blakeslee*, 22 C.C.(N.S.), 34 (38 O.C.C., 462); *Wettstein v. Bank*, 20 C.C.(N.S.), 201, 204 (38 O.C.C., 472, 475.)

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Upon a careful consideration of the entire record and the authorities cited, we are forced to the conclusion that the judgment of the trial court is contrary to the evidence. Such judgment will therefore be reversed and the cause remanded for further proceedings.

Judgment reversed.

ALLREAD, J., and FERNEDING, J., concur.

EXEMPTION FROM JURY SERVICE.

Court of Appeals for Franklin County.

STATE OF OHIO, ON THE RELATION OF JAMES O. CUTLER AND
SIMEON NASH, v. JOHN B. MILES, AS CLERK OF THE
COMMON PLEAS COURT OF FRANKLIN COUNTY.

Decided, May 17, 1917.

*Constitutional Law—Validity of Amended Section 5211, Relating to
Exemption from Military Service.*

Section 5195 of the revised and recodified military laws of the state (107 O. L., 387), providing that contributing members of the Ohio National Guard shall be exempt from jury service, is not open to the objection which rendered this provision invalid as it stood in its original form (Section 5211, G. C.), nor is it in conflict with any other constitutional provision but is valid and enforceable.

Turney, Olds & Sipe and Simeon Nash, for plaintiff.

Robert P. Duncan, contra.

BY THE COURT (KUNKLE, ALLREAD and FERNEDING, JJ., concurring).

This case is submitted to this court upon a demurrer to the petition of the plaintiffs.

The action involves the constitutionality of the provisions of Section 5211, General Code, providing that contributing members to the Ohio National Guard shall be exempt from service as jurors.

Traction Co. v. Murphy.

[28 O.C.A.]

We have carefully considered the authorities cited in the very exhaustive briefs which have been filed by counsel. We shall not undertake to discuss in detail these authorities so cited, but will merely announce the conclusion at which we have arrived after a consideration of such authorities. We shall adopt this course for the reason that this case can, and doubtless will, be taken to the Supreme Court where it can be authoritatively reported.

A former act embodying some of the features of the act under consideration was before our Supreme Court in the case of *Hamann v. Heekin*, 88 O. S., p. 207, wherein such former act was held unconstitutional.

We have carefully examined the present act in connection with the case above referred to, and are of opinion that the present act does not come within any of the objections made by the Supreme Court to the former act, nor do we think it conflicts with any provision or limitation of the Constitution.

We appreciate the suggestion of counsel for defendant as to the wisdom of the exemptions from jury duty provided in this act, but that is a question for consideration by the Legislature rather than by the courts.

Demurrer overruled.

DETERMINATION AS TO COMPARATIVE NEGLIGENCE.

Court of Appeals for Hamilton County.

THE CINCINNATI & COLUMBUS TRACTION CO. ET AL V.
MURPHY, ADMINISTRATOR.*

Decided, February 12, 1914.

Degree of Negligence and of Freedom from Negligence—Presumption as to Freedom of Both Parties from Negligence—Course of Employment and Scope of Duties—Employee Electrocuted by Wires Near Machine at which He Had Been Placed for Work.

1. When the evidence establishes the negligence of an employer, and the circumstances of the death of an employee shows negligence on the part of the deceased, the question of the degree of negligence of each becomes one for the jury under proper instructions from the court.

*Motion to certify record in this case overruled by the Supreme Court, May, 1914.

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2. Where an employee reported for duty at the usual time, was at the place where during working hours his work for the day was to be performed, and came in contact with the wires which caused his death by electrocution within less than ten feet of the machine upon which he was to work as soon as the foreman finished his breakfast, it can not be said as a matter of law that he was not acting at the time within the scope of his employment. The question is one of fact to be submitted to the jury under proper instructions from the court.
3. In a suit by an administrator of a deceased employee for damages on account of the alleged negligence of the employer, which negligence it is charged caused such death, the law presumes at the outset of the case that both parties are free from negligence.

C. B. Matthews and Harry Klein, for plaintiffs in error.

Daniel W. Murphy and Thomas L. Michie, contra.

JONES (E. H.), J.

This action was brought in the court of common pleas by defendant in error, Daniel W. Murphy, as administrator of the estate of Otto Smith, deceased, for damages on account of the death of the intestate, caused, as alleged in the petition, by the negligence of the plaintiff in error, the Cincinnati & Columbus Traction Company, of which company the decedent was at the time of his death an employee. He had been called from his usual work as a bridge carpenter in the employ of said company to assist in the repair of the generator of said company at its sub-station at Madeira—a station on the line of said company's road. The machinery of this sub-station had been burned out during a storm, by reason of which an emergency had arisen requiring an extra number of men to string wires and do other work necessary to restore normal conditions so that the cars could be operated over the road.

The petition alleges that while so employed at said time and place the plaintiff's said intestate was electrocuted, and that his death was caused by physical contact of both his hands with two wires which the defendant then had at its said station and which were used to charge its generator.

The facts as shown by the evidence are, that the storm which resulted in the damage took place on a certain Saturday evening,

and that during the whole of the following day, Sunday, the decedent, together with the other employees called upon, was engaged in stringing wires at the said place; that he worked until the evening of said day; and that he then went to his home and returned on the following morning at about the usual hour of beginning work to resume his labors at said sub-station. His foreman, at the time of or shortly after decedent's arrival, went to the second floor of the building in which the power machinery was located to eat his breakfast with the family of the station agent, who occupied said floor as his home. The work on the previous day consisted in part in stringing wires from a box car some little distance away from the sub-station, in which a generator had been temporarily placed, to the machinery in the first floor of this sub-station. These wires were taken into the building at or near one of the windows in the second story and were carried down to the first floor along the wall upon one side of the stairway leading to the rooms above. It was while waiting for the foreman to finish his breakfast that the decedent in some manner came in contact with these wires, and by reason thereof came to his death.

The negligence complained of in the petition is that the defendant company left said wires without any insulation, and unguarded, that the intestate had no knowledge that they were charged with an electric current and no warning was given him of the danger, and that he was not aware nor had he any means of knowing of such danger.

The trial below resulted in a verdict for the plaintiff, defendant in error here, upon which judgment was afterwards rendered, and it is to reverse that judgment that this proceeding in error is prosecuted.

It is contended in the brief for plaintiff in error, first, that the decedent's death was the result of his own willful and deliberate act; in other words, due solely to his own negligence.

The evidence in the case fully establishes the negligence of the traction company. The evidence shows that when the intestate quit his work on Sunday evening and left for his home the current was not turned on and these wires were not charged.

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There is some little conflict upon this point, but the evidence in favor of this view greatly preponderates. In fact, about the only evidence to the contrary is that of Mr. Charles E. Smith, the foreman above referred to, whose testimony is on page 57 of the bill of exceptions:

“Question. Can you say whether Otto Smith knew that those wires were charged on Monday morning or not?

“Answer. He should have known it; he knew that they would have to be charged to run the road or to run the rotary, and he knew that they were charged on Sunday evening before he left there, because we started up the machinery before he left.”

But the same witness (bill of exceptions, page 48) had previously stated:

“Answer. No, sir, there was no current in those wires on Sunday.”

The negligence of the defendant company having been proven, and granting that the circumstances of the death showed negligence on the part of decedent, the question of the degree of negligence of each became one for the jury, by the provisions of Section 6245-1, General Code, under proper instructions from the court.

The charge of the court seems to us to contain a full and clear explanation to the jury of the rule with reference to the doctrine of comparative negligence. Such being the case, we have no authority to disturb the verdict of the jury even though the evidence might tend to show negligence on the part of the plaintiff's intestate.

Another point urged by counsel for plaintiff in error in argument is that at the time of the accident the decedent was not acting for the defendant traction company within the course of his employment or the scope of his duties. The evidence bearing upon this point has been summed up in what was said above with reference to the time of the accident and the place where it occurred. The decedent came in contact with the wires which caused his death within less than ten feet of the machine upon which he was to work as soon as the foreman finished his break-

fast. The lips of the decedent having been instantly sealed by death, no one knows or ever will know just why he was upon the stairway at the time, and no satisfactory inference can be drawn. He may have been on his way to ask his foreman some question with reference to his work, or it is possible that he expected to rest upon the steps while waiting. In either event we think the jury would be justified in finding that he was acting within the scope of his employment; and plaintiff having shown that decedent had reported for duty at the usual time, and that he was at the place where during working hours his work for the day was to be performed, we think it can not be said as a matter of law that he was not acting, at the time, within the scope of his employment, and was not about his master's business. The Supreme Court of Ohio, in the case of *Lima Ry. Co. v. Little*, 67 Ohio St., 91, has held that this question is one of fact to be submitted to the jury under proper instructions from the court.

The third point urged in the brief, namely, that the jury and court can not guess as to the liability of the defendant, is disposed of by what has been said above. There was ample evidence tending to show negligence on the part of defendant. The law presumes at the outset of the case that both parties are free from negligence, and the plaintiff below as well as the defendant had the benefit of this presumption. There having been evidence of negligence on the part of defendant, and assuming that the jury would be warranted in finding that the plaintiff's intestate was also negligent, and the relation of master and servant or employer and employee having been shown, the case was one for submission to the jury under the authority of the section of the General Code above referred to.

We find no error in the proceedings in the court below, and believe that substantial justice has been done.

Judgment affirmed.

JONES (Oliver B.), J., concurs. SWING, J., not participating.

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**DISTRIBUTION OF UNDETERMINED PORTIONS UNDER
A WILL.**

Court of Appeals for Hamilton County.

BROERMANN, JR., v. KESSLING ET AL.

Decided, May 14, 1914.

*Wills—Undetermined Portions of an Estate—Distributed Per Capita
for Sake of Equality—Division Among Grandchildren.*

1. As a general rule, where a testator has left undetermined the proportions in which his beneficiaries are to take, the courts, favoring equality, will direct the distribution to be *per capita* rather than *per stirpes*.
2. A testator devised certain real estate "to the children of Elizabeth Boewer and the children of Marianna Broermann and Frederick Broermann, all said children being my grandchildren, to have and to hold the same for the said grandchildren, their heirs and assigns forever." On the death of the wife of the testator, who was given a life estate in the real estate in question, there were, surviving her, two children of Elizabeth Boewer and twelve children of Marianna Broermann and Frederick Broermann. *Held*: That each of the fourteen grandchildren takes an undivided one-fourteenth of the real estate in question.

Wm. Jerome Kuertz, for plaintiff.*Badger & Ulrey, C. A. Leach, William J. Creed, Fred P. Muhlhauser and Samuel B. Hammel*, contra.

JONES (Oliver B.), J.

This is an action for partition, heard on appeal from the court of common pleas. It is sought to partition real estate devised under clause 1 of item 3 of the will of John B. Cook, deceased. The only question in the case is whether the devisees named in that clause take *per capita* or *per stirpes*.

After first giving a life estate in all of his real estate to his wife by item 3 of his will, he disposes of it after her death by separate clauses in the same item, devising different parcels of

real estate to different relatives. The language in clause 1 is as follows:

"I give and devise to the children of Elizabeth Boewer, and the children of Marianna Broermann and Frederick Broermann, all said children being my grandchildren, the following real estate, to-wit: [here follows description of property] to have and to hold the same for the said grandchildren, their heirs and assigns forever."

The widow, Mary E. Cook, died in January, 1913, two children of Elizabeth Boewer and twelve children of Marianna Broermann and Frederick Broermann surviving her. The question is whether the Boewer children each take one-fourth of this property and the Broermann each one twenty-fourth, or whether each of the fourteen children take one-fourteenth.

No provision was made in the will for testator's daughters, Elizabeth Boewer and Marianna Broermann, and the latter at least is still surviving, and as stated at the trial both were in life at the time of the making of the will and probably at the death of the testator.

As a general rule, where the testator has left undetermined the proportions in which his beneficiaries are to take, the courts, favoring equality, will direct the distribution to be *per capita* rather than *per stirpes*. Thus where a devise is to the children of several persons, whether it be to the children of A and B, or to the children of A and the children of B, they take *per capita* and not *per stirpes*. Beach on Wills, 504, Section 304, and 2 Jarman on Wills (6th Ed., Bigelow), 204 (1050).

Where all the persons entitled to share stand in the same degree of kin to the decedent, as, for instance, all grandchildren, and claim directly from him in their own right, and not through some intermediate relation, they take *per capita*. 1 Schouler on Wills (5th Ed.), Section 538.

Wherever as a class the beneficiaries are individually named, or are designated by their relationship to some ancestor living at the date of a will, whether to the testator or some one else, they share *per capita* and not *per stirpes*, and especially if they

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are all of the same degree. 1 Schouler on Wills (5th Ed.), Section 540. and Page on Wills, Section 558, page 648.

In *Hill, Admr., v. Bowers*, 120 Mass., 135, Chief Justice Gray, in the opinion of the court, says at page 136:

“The general rule is that by a bequest to the children of A and to the children of B, the children take *per capita* and not *per stirpes*, in the absence of words indicating a different intention. There are no such words in this will.”

In the case at bar we fail to see any words indicating any intention different from the general rule as above stated. The language of the will reduces the beneficiaries to a single class, that that of grandchildren, in the words “all said children being my grandchildren,” and also, after description of the property, by repetition, in the use of the words “to have and to hold the same for the said grandchildren their heirs and assigns forever.” While these grandchildren are designated not by individual names, but by the fact of their parentage, they take nothing under a devise from the parent or as representatives of the parent; they take directly as grandchildren of the testator, and, being all of the same class, the general rule must apply and they must take equally or under the *per capita* rule.

In 40 Cyc., 1490, the following language is used:

“As a general rule the devisees or legatees of a will will if possible be construed to take *per capita* rather than *per stirpes*, unless the will shows a contrary intention on the part of the testator, as where the beneficiaries are to take substitutionally; and in case of doubt the statutes of descent and distribution should be followed as nearly as possible.”

If it were necessary under this rule to refer to our statutes, a reading of Sections 8580 to 8583, inclusive, General Code, would convince us that if the parents of these grandchildren were his only children and had predeceased their grandfather, then these grandchildren being of the same class would under the terms of Section 8581 take by inheritance equal shares. Thus we see that the *per capita* rule would accord with the statutes of Ohio.

It is, however, argued properly that the entire will must be read in order to put a proper construction upon any ambiguous clause, and it is urged by counsel for the Boewers that the other three clauses in item 3 indicate an intention on the part of the testator to divide the estate equally among the original children or their representatives. The fact that Mrs. Broermann, if not Mrs. Boewer also, are still living and take nothing under the will negatives any such argument. *McIntire v. McIntire*, 192 U. S., 116, and *Blackler v. Webb*, 2 P. Wms., 383.

The argument that clauses 2, 3 and 4 indicate a purpose on the part of testator to equalize the division of his property among the representatives of his eight children is not borne out by a consideration of those clauses. The second clause gives a piece of real estate to his sons George and Bernard, and the fourth clause gives two pieces of real estate and certain chattel property to two other sons, Louis and William, and the third clause gives to two grandchildren, each being a daughter of a deceased daughter of the testator, another piece of real estate and certain street railway stock. There is nothing in the record to show that these parcels of real estate are of equal value. The usual presumption would be that they are not of equal value. The testator, however, desired to so divide his property, and we are not at liberty to speculate upon his reasons for so doing; but the fact that he did so does not in any way aid us in the construction of the language employed in the first clause of the same item. It happens that Marie Catherine Funk and Louisa Eberling, the two deceased daughters named in item 3, clause 3, each had a single child surviving the life tenant, and that neither of said children being mentioned by name in said item each would take one-half; but that can not be used as an argument that they take by representation.

Two of the cases cited by counsel for the Boewers which uphold a division *per stirpes*, to-wit, *Bool et al v. Mix*, 17 Wend., 119, and *Houghton v. Kendall et al*, 7 Allen (89 Mass.), 72, 77, are cases where an estate for life was given to the child, with the remainder over to the grandchildren, in such a way as to show an intention on the part of the testator to have the grandchildren

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take as representatives of their respective parents. But in all of the remaining cases cited by counsel, without exception, there have been kinsmen in different degrees of consanguinity, which would require those of the more remote relationship to take as representatives of their parents who would have been in the same class.

These cases therefore can not control the court in the construction of the case at bar where all of the beneficiaries are grandchildren who take directly as such and not in the right of their respective parents.

A decree will therefore be entered finding that each of the fourteen grandchildren who are parties to the proceeding is entitled to an undivided one-fourteenth of the real estate described in the petition, and partition had accordingly.

Judgment accordingly.

SWING, J., and JONES (E. H.), J., concur.

REVERSALS ON WEIGHT OF THE EVIDENCE.

Court of Appeals for Muskingum County.

MCDONALD & FRAZIER V. HERB SCHERVISH.*

Decided, May 5, 1918.

Reviewing Court—Not at Liberty to Reverse a Second Time on Weight of the Evidence—Notwithstanding Adherence to the Correctness of Its Former Action—Not Error to Refuse to Give Special Instructions to the Jury, When.

1. A reviewing court is without authority to reverse a second time on the weight of the evidence a judgment against the same party and based on the same evidence, notwithstanding the court adheres to its former opinion that the judgment is one which ought to be reversed.
2. It is not error for a trial judge to decline to submit to the jury special written propositions of law upon request of counsel after

*For previous opinion in this case, see 26 C.C.(N.S.), 394.

argument to the jury, where the law necessary for determination of the issues involved has been given in clear, plain and unambiguous language applicable to the case as made by the proof.

E. R. Meyer and A. A. George, for plaintiff in error.

John C. Bassett, contra.

HOUCK, J.

The case now before us for judicial determination is one in error and comes from the Common Pleas Court of Muskingum County. The parties here stand in this court in the same relation to each other as in the court below.

The suit of plaintiff was based on a promissory note on which it claimed judgment for \$152 with interest at six per cent. from April 9, 1914. The petition set forth that said note was executed by the defendant, payable to McDonald & Wagner, and bore the date of February 9, 1914, falling due in two months with interest at six per cent. after maturity; and that plaintiff was the successor of the firm of McDonald & Wagner and was, at the time of filing suit, the owner and holder of said note and entitled to recover on same.

The answer of defendant set up the following defenses:

1. That there was no consideration for the note.
2. That the note was given without interest until after due, which was done for the purpose of inducing the defendant to take an insurance policy on his life, for which the note in question was given in settlement of the first year's premium.
3. That the defendant was induced to take said insurance by reason of certain false and fraudulent statements made to him by McDonald & Wagner, namely, that said policy, at its maturity, which was twenty years, would yield in cash about \$5,000, providing the annual premiums were paid as provided in the policy; that said representations and statements were false and known to be so by the original payees at the time they were made and at the time of the execution and delivery of said note.

Plaintiff filed a reply to the answer, being, in effect, a general denial of all the material averments in the answer.

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Trial was had to a jury and a verdict returned for the defendant. The usual motion for a new trial was filed and overruled by the court and judgment entered accordingly. The errors complained of, and for which a reversal of the judgment is sought, are two:

1. That the verdict and judgment are against the manifest weight of the evidence.

2. That the trial judge erred in his refusal to submit to the jury, after counsel had argued the case to the jury, certain written propositions of law, as requested on the part of plaintiff.

As to the first alleged error, we will state that this is the second time this case has been before us for review.* The first time we reversed it for the reason that the verdict of the jury was clearly against the manifest weight of the evidence.

We have made a careful examination of the record now before us and find that the verdict of the jury was based upon the same evidence and proven facts as the verdict in the former case, and if we were not precluded, by the statute, from so doing, and the decisions of our courts thereon, we would reverse it a second time for the same reason as in the first instance.

Section 11577, General Code, reads:

“The same court shall not grant more than one new trial on the weight of the evidence against the same party in the same case, nor shall the same court grant more than one judgment of reversal on the weight of the evidence against the same party in the same case.”

This court as now constituted has passed upon this question and construed the above statute in the case of *Fruit Dispatch Co. v. Lisey & Co.*, 22 C.C.(N.S.), page 7. The Supreme Court of our state has also passed upon the same question and construed this statute, as appears in Vol. 93 O. S., page 61, *Mahoning Valley Ry. Co. v. Santoro, Admr.*, where the court say:

“The sole and exclusive purpose of Section 11577, General Code, is to limit the number of reversals on the weight of the evidence by the same reviewing court. By the Constitution, it is said three must concur before you can reverse on the weight

of the evidence. By the statute, it is provided that you can thus reverse on the weight of the evidence but once. In this view of the case, the constitutional provision and the statutory section are not only fairly reconcilable by a fair course of reasoning, but, on the contrary, there is no semblance of conflict or repugnancy between them."

It is apparent from what we have already said, that by statutory enactment and judicial decision the same court shall grant no more than one new trial on the weight of the evidence against the same party, and but one judgment of reversal on the weight of the evidence against the same party in the same case. It therefore follows that we are wholly without authority of law to reverse the judgment in the present case upon the ground that it is against the manifest weight of the evidence.

Coming now to a discussion of the second ground of alleged error, we think the rule is well settled that all of the parties to a lawsuit are entitled to have the law, necessary for a proper determination of the issues presented, given to the jury in clear, plain, and unambiguous language applicable to the case made by the proofs. And where the trial judge fully complies with this rule in his general charge to the jury, it is not error to refuse to give, after argument of counsel, special charges, if the substance of such charges is given in the court's general charge.

From our examination of the general charge of the trial judge, in the case at bar, we are convinced that he fully and completely submitted to the jury every proposition of law essential to the case, as raised by the pleadings and facts, necessary for a correct and proper determination of the rights of the parties to the case under review.

Further discussion of the errors complained of seems unnecessary. The record presents no errors prejudicial to the rights of plaintiff in error, and for that reason the judgment below is affirmed.

POWELL, J., and SHIELDS, J., concur.

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Montgomery County.

**DISCRETION IN THE MATTER OF TUBERCULOSIS
HOSPITALS.**

Court of Appeals for Montgomery County.

STATE, EX REL WOOLERY ET AL, V. BRENNER ET AL.*

Decided, June 20, 1916.

Constitutional Law—Validity of the Tuberculosis Hospital Act—Joint Board Not Subject to Control by the Courts—Appropriation—Owner of Lands About to be Taken May Enjoin Proceedings, When.

1. The district tuberculosis hospital act is constitutional.
2. The joint board created by such act is invested with a discretion which can not be controlled by the courts, at least in the absence of fraud or gross abuse of discretion.
3. The location and construction of a tuberculosis hospital building does not constitute a nuisance *per se*.
4. An owner whose lands are about to be taken for any public purpose, without such owner being made a party to the condemnation proceedings and without compensation first being made, is entitled to have relief by way of injunction to protect his property.

J. A. Kerr and J. A. Sharts, for plaintiffs.

D. W. Iddings, Robert C. Patterson, P. A. Saylor and Robert R. Nevin, contra.

FERNEDING, J.

This case is presented on demurrer to the second amended petition. The case involves important questions which have been thoroughly and ably argued by counsel on both sides. Some questions have been presented involving procedure, but we have gone to the merits of the case as presented by the petition.

We do not consider it necessary to go into detail, but will content ourselves with merely announcing our conclusions upon the controlling questions of the case.

*Judgment affirmed on the authority of *Drissel v. State*, 87 Ohio State, 154.

In respect to the constitutionality of the law, we feel bound by the decision of the Supreme Court in the case of *Brissel et al v. State, ex rel*, 87 Ohio St., 154, and other cases which the Supreme Court has had occasion to consider and in which it has been held that the Tuberculosis Hospital Act is constitutional.

The counsel for plaintiffs refer to the exemption of municipalities containing a tuberculosis hospital, but we think that even if this question was not in the former cases presented to the Supreme Court, there would be a sufficient reason for the exemption of municipalities which had already provided a tuberculosis hospital. Whether tuberculosis patients of a municipality could find their way, by the process described in argument, through the county infirmary into the district hospital, we are not called upon to express an opinion at this time.

In any event, as we are advised, this provision exempting municipalities having a tuberculosis hospital was introduced by amendment passed April 17, 1913 (103 O. L., 492, 494), and if that feature is unconstitutional, it would go to the validity of the amendment rather than to the validity of the entire act.

We therefore hold that the act, so far as involved in the present case, is constitutional.

We are also of opinion that the joint county board is invested with a discretion which can not be controlled by the courts, at least in the absence of fraud or gross abuse of discretion, and we do not consider that the facts stated in the second amended petition are such as to constitute either fraud or gross abuse of discretion.

The statutes have expressly authorized the location and construction of tuberculosis hospitals, and we do not think that we are justified, even under the averments of the second amended petition, in holding that the location and construction of the hospital building constitute a nuisance *per se*. The nuisance, if any, contemplated by the second amended petition, must be held to be one growing out of the operation of the hospital and the question is, therefore, premature at this time. If the hospital should be operated in the manner shown by the averments of the petition, it would be ample time for a court to enjoin when such

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careless and negligent operation of the hospital should be demonstrated.

In respect to the contention that there is no money in the treasury available for the purchase of the property, we think this is insufficient for two reasons: First, the petition does not show that there is any money in process of collection, and, second, the statute would apply at the time when the joint board condemned the property and is about to expend the county funds for the purpose of paying the purchase price. The property can not be taken until the compensation is actually paid.

There are other objections, made in the first and second causes of action, to the condemnation of the property and the location and construction of the tuberculosis hospital, but we think none of these are sufficient to sustain an injunction.

The third cause of action seeks to prevent the joint board of trustees from appropriating certain real estate, in which the plaintiff has an interest, for a right-of-way and easement, without making or allowing plaintiffs to be made parties to the condemnation case and without first making compensation therefor.

Counsel for defendants claim the fact to be that both Woolery and Ratcliff are made parties defendant in the condemnation case; but we are bound by the averments of the petition. While the plaintiff Woolery does not very clearly assert that he and Ratcliff were not parties, yet the inference to that effect from the petition is sufficiently clear.

The petition avers that the right-of-way in controversy "Is sought to be appropriated by said condemnation proceedings without making or allowing this plaintiff or said Alonzo Ratcliff to be made parties thereto."

There is a further averment that:

"Plaintiff has heretofore applied to said court of common pleas to have Alonzo Ratcliff made a party to the condemnation proceedings and said court overruled said motion and refused to allow plaintiff to plead therein."

We think the necessary inference from these averments is that neither the plaintiff nor said Alonzo Ratcliff is a party to the con-

demnation proceedings. The case is, therefore, according to the petition, one in which the joint board of trustees are about to appropriate a certain right-of-way over the lands of the plaintiff, without his being made party to the condemnation proceedings and without first making compensation to plaintiff for his interests in the property about to be taken.

We think it is familiar law that an owner whose lands are about to be taken for any public purpose, without such owner being made a party to the condemnation proceedings and without compensation first being made, is entitled to have relief by way of injunction to protect his property.

It therefore follows that the demurrer to the first and second causes of action should be sustained and to the third cause of action overruled.

Decree accordingly.

KUNKLE, J., and ALLREAD, J., concur.

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Hamilton County.

**LIABILITY FOR COST OF CHANGING LOCATION OF
A GAS MAIN.**

Court of Appeals for Hamilton County.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO.
v. THE UNION GAS & ELECTRIC CO.

Decided, March 6, 1916.

*Grade of Street Changed After Vacation—Necessitating Relocation of
Gas Main—Abutting Owner Not Liable for Expenses of Change.*

When a city street in which a gas main has been placed with the consent of the city is vacated by order of court at the petition of the owner of all the abutting real estate, upon the condition that such owner will at all times permit the company owning the gas main to enter upon the vacated street for the purpose of laying, keeping in repair, changing or removing its main, and such owner thereafter finds it necessary to change the grade of the vacated street, the owner is not liable to the company owning the gas main for the cost of changing the location of the main to conform to the new grade.

Harmon, Colston, Goldsmith & Hoadly, for plaintiff in error.
Miller Outcalt, contra.

JONES (E. H.), J.

This action was brought by the Union Gas & Electric Company to recover from the Cincinnati, New Orleans & Texas Pacific Railway Company the sum of \$2,169.12 expended by it (the gas company), in lowering or changing the location of its large gas main in the yards of the railway company.

Prior to May 18, 1892, there was a street in Cincinnati known as Dalton avenue; and in the year 1894 the gas company, with the consent of said city, laid a 24-inch gas main in that street. On May 18, 1892, plaintiff in error, being the owner by virtue of perpetual leases with privilege of purchase of all the property abutting on both sides of Dalton avenue between Hopkins

and Kenner streets, filed a petition in the court of common pleas for the vacation of Dalton avenue between Hopkins and Kenner streets. The prayer of the petition was granted by said court on November 26, 1902. The court, as a condition upon which the order of vacation would be made, required the plaintiff in error to agree that it would "at all times permit the Cincinnati Gas Light & Coke Company, its successors and assigns, to enter upon the said vacated street or vacated parts of streets for the purpose of laying, keeping in repair, changing or removing its system of gas mains and pipes, in the streets or parts of streets vacated."

In the year 1903 the plaintiff in error graded that part of Dalton avenue which had been vacated, and laid tracks across it. These tracks were laid in close proximity to the top of the gas main above described. In fact, the rails of one of the tracks were resting on said main. This condition so remained until August, 1910, when defendant in error made discovery thereof and made a demand on the plaintiff in error to change the location of the pipes. This the plaintiff in error refused to do; and the gas company then did the work it deemed necessary and demanded that the railway company pay the expenses thereof. This was refused, and this suit was filed in the court below on February 15, 1912, to recover the expenses of doing that work.

There were two defenses set out in the answer, the first admitting certain allegations of the petition, and then making general denial of the remaining allegations; the second setting up the four-years statute of limitations.

Prior to the vacation of this portion of Dalton avenue, while it was still under the control of the city, there could have been no question about the right of the city to change the grade of the avenue, and, likewise, no question but that the gas company would have had to bear all expenses of removing, lowering or raising its pipes, made necessary by such change in the grade of the street. See *Columbus Gas Light & Coke Co. v. Columbus*, 50 Ohio St., 65. We quote from proposition 2 of the syllabus:

"A gas company laying its pipes in the streets of the city, under a grant from the city, in conformity with an established

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grade, does so subject to the right of the city to change the grade of the street whenever the necessities of the public require it, and, in the absence of wantonness or negligence on the part of the city, the company can not maintain an action for damages occasioned by the necessity of taking up and relaying its pipes in order to accommodate them to the new grade."

It follows that had the grade of Dalton avenue been changed by the city of Cincinnati before the decree for vacation, the gas company would have been compelled to change the location of its pipes and to bear the expense thereof.

By the terms of the court's decree vacating the avenue the right to maintain the pipe therein is made secure; without such provision in the entry, said right would have then terminated. The manifest purpose of the court was to protect as far as possible such rights as the gas company then had. It was powerless to do more. There was no attempt on the part of the court to enlarge the rights of the gas company, and it is not claimed that any additional right followed the decree or inured to defendant in error under favor of statutory provision or by operation of law. The railway company being the owner of all the property abutting on both sides of the vacated street became the owner and was entitled to the possession of the part vacated, with the right to use for yard purposes in the same manner and as completely as it could use its contiguous property, subject only to the rights of the gas company as they then and theretofore existed.

No question enters this case as to the necessity or reasonableness of the grading done by the railway company. The presumption to which it is entitled—that its plans were adopted in good faith and the work carefully done—has not been assailed in any way.

Neither is there any question in this case but that the gas company was justified in looking upon the proximity of the rails to its pipe, and the operation of locomotives and cars over same, as a menace to its business, its patrons and the public. But this condition was brought about by reason of a necessary change of grade, and a rightful, lawful use of its property by plaintiff

in error, and we know of no rule of law that would compel the railway company, in the absence of an agreement, to bear the expense incurred in changing the location of the pipe.

The question of the statute of limitations is discussed in the briefs. It is claimed by the railway company that this action accrued in 1903 when the track was laid, which if true would be a bar. The gas company claims that the operation of the cars over the tracks as laid constituted a continuing trespass and that the statute did not begin to run until the change was made in the location of the pipe and the cost of same ascertained and paid.

Having found that no cause of action ever arose, we do not deem it necessary to determine this question. From such consideration as we have given the matter we are inclined to think that the action is barred.

For the reasons stated the judgment of the court below is reversed, and the judgment which that court should have rendered will be entered here.

Judgment reversed, and judgment for plaintiff in error.

JONES (Oliver B.), J., and GORMAN, J., concur.

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Butler County.

TECHNICAL PRECISION NOT REQUIRED OF COUNTY COMMISSIONERS.

Court of Appeals for Butler County.

STATE, EX REL LANDIS, V. BOARD OF COMMISSIONERS OF BUTLER COUNTY ET AL.*

Decided, March 13, 1916.

County Commissioners—Legitimate Discretion of, Will Not be Interfered with by the Courts—Clerk of a Board of County Commissioners Not a County Officer.

1. In construing the records of county commissioners, acting within the scope of their authority, to ascertain whether or not they have followed certain statutory requirements, technical precision will not be required. It will be sufficient if it appear, though informally, from a reasonable construction of the whole transcript of the proceedings, that these requirements have been observed.
2. It is not a proper exercise of the judicial powers of a court to interfere by injunction with the legitimate discretion of county commissioners, so long as that discretion is being honestly exercised by them in good faith within the limits of the powers conferred by statute.
3. The duties of the clerk of the county commissioners, appointed under the provisions of Section 2409, General Code, are purely clerical in their nature, and not of a character that would require independent official action such as would constitute the clerk a county officer under the provisions of the Constitution of Ohio.

Andrews & Andrews, for plaintiff.

Ben. A. Bickley, Prosecuting Attorney, and *W. C. Shepherd*, contra.

JONES (Oliver B.), J.

This is a tax-payer's suit to enjoin the board of county commissioners from employing William W. Crawford as clerk of such board, and from the payment of any money to him for

*Affirmed by the Supreme Court, *State, ex rel Landis, v. Commissioners of Butler County et al*, 95 Ohio State, 157.

salary under such employment, and to order the return and restoration to the auditor's office of the books and records of the board of county commissioners.

The relator, Samuel C. Landis, states in his supplemental petition and the amendment thereto the following reasons why such employment and expenditure of money would be unlawful:

"1. That it is not necessary for the clerk of said board to devote his entire time to the discharge of the duties of such position.

"2. That said board of county commissioners did not by said resolution resolve that it was necessary for the clerk to devote his entire time to the discharge of the duties of such position.

"3. It does not require more than a few hours per week to perform the duties as clerk of said board.

"4. To carry out said contract would require the expenditure of \$1,500 per annum of the public money for services which can be easily performed by the auditor of said county without any cost to the county.

"5. That said services as clerk of said board have always heretofore for many years been performed by the auditor of said county without any cost to the county, and there is no reason why the same can not hereafter be so performed.

"6. Said board of county commissioners did not investigate the facts, and did not sit as a board of inquiry on the facts and on the necessity for the employment of said clerk.

"7. Said board of county commissioners did not find it was necessary for the employment of such clerk, and made no finding whatever on the subject.

"8. That said board of county commissioners did not find that it was necessary for the clerk to devote his entire time to the duties of his position.

"That the statute under which said commissioners made such appointment of said clerk is unconstitutional."

Provision is made in Section 2566, General Code, that the county auditor shall be the secretary of the county commissioners. Said section is as follows:

"By virtue of his office, the county auditor shall be the secretary of the county commissioners, except as otherwise provided by law. When so requested, he shall aid them in the per-

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formance of their duties. He shall keep an accurate record of their proceedings, and carefully preserve all documents, books, records, maps and papers required to be deposited and kept in his office."

This same section was formerly Section 10 of the act prescribing the duties of county auditors, passed April 4, 1859 (56 O. L., 128; 1 S. & C., 97). In this original form it reads as follows:

"The county auditor shall by virtue of his office, be clerk to the board of county commissioners of his county, and shall keep an accurate record of their corporate proceedings, and shall carefully preserve all the documents, books, records, maps, and other papers, required to be deposited or kept in his office."

Authority is given the commissioners to appoint a clerk under Section 2409, General Code, which is as follows:

"If such board finds it necessary for the clerk to devote his entire time to the discharge of the duties of such position, it may appoint a clerk in place of the county auditor and such necessary assistants to such clerk as the board deems necessary. Such clerk shall perform the duties required by law and by the board."

Certain duties are prescribed by statute for the clerk, some of them being set out in Sections 2406, 2407, 2522 and 2531, General Code.

The resolution under which the employment objected to was made was adopted by the board of county commissioners at its meeting September 20, 1915, by a vote of two yeas and one no. The vote not being unanimous, under the provision of Section 2414, General Code, the resolution was again voted on at the meeting of October 16, 1915, at which time the following resolution was adopted by the yeas of each of the three commissioners:

"*Resolved*, by the Board of County Commissioners of Butler County, Ohio, That the resolution adopted by this board September 20, 1915, be amended to read as follows:

"*THAT, WHEREAS*, The Board of County Commissioners of

Butler County, Ohio, deems it necessary to have a clerk who can devote his entire time to the discharge of the duties of such position,

"Therefore, Be it Resolved, by the Board of County Commissioners of Butler County, Ohio, that commencing October 18, 1915, W. W. Crawford be and is hereby employed as clerk of this board at a salary of \$125 per month, payable monthly. Such clerk shall perform the duties required by law and the board."

It is contended by relator that the board of county commissioners did not by this resolution, or by any other action, find that it was necessary for the clerk to devote his entire time to the discharge of such position, and counsel argue that without such finding no power exists under the law for the appointment of a clerk.

The criticism made by counsel for relator is well taken in that the language employed in the preamble of the resolution as passed is not in its effect the same as the finding required under Section 2409 before an appointment of clerk can be made. In other words, it is not the same "to have a clerk who can devote his entire time" as it is "for the clerk to devote his entire time."

It is further insisted by counsel that the record itself must show that the board upon full consideration, and possibly on hearing evidence, or at least after considerable experience had by each member in the performance of his official duty, must make an official finding of the necessity for the clerk to devote his entire time to the discharge of the duties of the position before any appointment can be made.

It is insisted that the word "finds" has a technical meaning which requires personal experience, or something equivalent to the hearing of evidence and a judicial consideration of the necessity, and the arrival at a judgment or judicial decision in the matter; and that the word "deems," which is used in the commissioners' resolution and found in Sections 2410, 2411 and 2412, means something different from the word "finds" as used in Section 2409. Counsel have submitted dictionary definitions

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of these two words, one of the definitions given for "deem" being "to hold in * * * opinion; decide as a conclusion; consider, regard, believe"; among those for "find," "to discover through the perceptions or feelings; learn by experience; perceive; ascertain. To decide after judicial investigation." It will be seen, therefore, that there is no substantial difference in the meaning of the two terms as used in the section referred to, and that what was necessary for the board of commissioners, in order to act under Section 2409, was to become convinced after proper inquiry and consideration in good faith that the necessity existed for the employment of such clerk.

The rule for the construction of the records of inferior tribunals such as county commissioners has been laid down in the first paragraph of the syllabus of *Lewis et al v. Laylin et al*, 46 Ohio St., 663, as follows:

"In construing the records of inferior tribunals, acting within the scope of their authority, to ascertain whether or not they have followed certain statutory requirements, technical precision will not be required; it will be sufficient if it appear, though informally, from a reasonable construction of the whole transcript of the proceedings, that these requisites have been observed."

With this rule in mind, a fair construction of the resolution as adopted, taken in connection with the evidence set out in the record, convinces the court that the members of the board of commissioners did fairly consider the necessity for a clerk to devote his entire time to the discharge of the duties of the position, and that their intention in the passage of the resolution was to record such finding. There is evidence to show that one member of the board had served in that capacity at least one year, and the other two members had by personal inquiry and observation informed themselves in regard to their duties in this matter. There seems to be no more reason why members should be required to have months of experience, to pass upon a question such as this, than that similar experience should be required to exercise other official duties devolving upon them.

The evidence shows that there is, as might be supposed, a difference of opinion as to the necessity and wisdom of the employment of such a clerk. It discloses, however, that there is sufficient work to occupy the entire time of a clerk for the benefit of the county, whether that clerk be one employed directly by the board, or the county auditor in person, or one of his deputies; and, while the auditor himself would receive no additional compensation by reason of his duties as such clerk, if he performed that service, it is shown by the evidence that in practice it has been customary while he was the secretary of the board for the actual work to be done by one or more of his deputies, so that in any event the cost of the work would be paid from the public treasury.

In this case there is no charge made of fraud or bad faith upon the part of the commissioners. The most that can be claimed for the petition is a charge of abuse of discretion or mistaken judgment on their part. Relator practically asks the court to substitute its judgment and official discretion, as to the necessity for this employment and expenditure for that of the commissioners.

No matter what the personal view of the judges composing this court might be, it would not be a proper exercise of the judicial powers of the court to interfere by injunction with the legitimate discretion of the county commissioners so long as that discretion is being honestly exercised by them in good faith within the limits of the powers conferred by statute. *Mechem on Public Officers*, Sections 990, 991.

No such abuse of discretion or lack of good faith appears in the record as would require interference by the court.

It is contended, however, that Section 2409, General Code, is unconstitutional, inasmuch as the duties imposed by law upon the clerk of the county commissioners are of such a nature that he is necessarily a county officer. Numerous cases are cited in the briefs of counsel as to the difference between an officer and an employee. A careful consideration of the duties of this clerk, as set out in the statutes, shows that they are purely clerical in their nature, and not of a character that would re-

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quire independent official action such as would constitute the clerk a county officer under the provisions of the Constitution.

In *Kloeb, Auditor, v. Mercer County Commissioners*, 4 C.C. (N.S.), 565, it was held that the county auditor is a public officer, and that he is in no respect a mere clerk of the board of county commissioners, thus making the plain inference that such clerk is not an officer.

That part of old Section 845, Revised Statutes, which provided for legal counsel, was held unconstitutional in *State, ex rel Cline, v. Cannon et al*, 12 C.C. (N.S.), 103, and in *Ireton et al v. State, ex rel Hunt, Id.*, 202, for the reason that official discretion was attempted to be vested in legal counsel, mere appointees of the commissioners, who were thus, as to all civil matters, given the full authority conferred by law upon prosecuting attorneys. There are numerous cases in Ohio illustrating the difference between an officer and an employee, which it is not necessary to review. Among the many citations given by counsel are 29 Cyc., 1361; *State, ex rel Armstrong, v. Halliday, Auditor*, 61 Ohio St., 171; *State, ex rel, v. Brennan*, 49 Ohio St., 33, and *State, ex rel Atty.-Genl., v. Jennings et al*, 57 Ohio St., 415.

In our opinion Section 2409 is constitutional.

The only other matter to be considered is as to the custody of the records of the county commissioners.

Section 2405, General Code, provides that the meetings of the board shall be "at the office of the auditor, or the usual office of the commissioners," and Section 2407, General Code, provides that "When the board is not in session, the record book shall be kept in the auditor's office, and open at all times to public inspection." A careful examination of the numerous laws in regard to the meetings of the county commissioners, and the experience of the different counties in the state, would indicate that at least in the smaller counties the auditor's office is the office used by the commissioners. The statute requires that the commissioners shall furnish an office for the auditor. In many counties there are several rooms provided. In Hamilton county, we are informed, all of the rooms that are occupied by the commissioners for the board meetings, and for the engineer's offices

and road records, all of which are apart from those of the auditor, are designated by resolution on the minutes as part of the auditor's office, so that a literal compliance may be had with the statute.

In the opinion of the court these statutes are at best directory. The purpose of the law is that the records should be safely kept, and that they should be accessible to the public as public records open for inspection at reasonable times. There is nothing in the record of this case to show that the spirit of the law has been violated in that respect, and, if it should be deemed necessary, in order to comply literally with the statute, it is a simple matter for the commissioners to designate as a part of the auditor's office the rooms in which they may find it necessary to have their records stored. When the commissioners' office is open at the same hours as the auditor's office, with a clerk present to answer questions and furnish information, and opportunity afforded any tax-payer who may desire to inspect the minutes and other records, it would appear to be entirely unnecessary for him to carry the books from the commissioners' room to the auditor's room and place the burden upon the auditor or one of his clerks or deputies to care for them and furnish information in regard to them.

The record fails to show any reason why this court should intervene by injunction to interfere with the proper custody of its records by a board of county commissioners.

The petition will therefore be dismissed at the costs of the relator.

JONES (E. H.), J., and GORMAN, J., concur.

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**GIST OF THE OFFENSE WHERE SALES ARE MADE CONTRARY
TO THE PURE FOOD LAW.**

Court of Appeals for Shelby County.

CHARLES J. YUNKER v. STATE OF OHIO.

Decided, December 15, 1917.

Pure Food Law—Prosecution for Violation of—Granting of Application to Take Depositions Within Discretion of the Court—Illegal Sale, Not Identity of Purchaser, Constitutes the Offense.

1. Discretion to grant a commission to take depositions in a criminal prosecution, is reposed in the trial court, and unless it clearly appears of record that the trial court abused its discretion in refusing an application for such commission a reviewing court will not reverse the order below.
2. An application for a commission to take depositions in criminal prosecutions is limited by Section 13668, G. C., to issues of fact joined upon indictment, and a justice of the peace in a prosecution for violation of the pure food laws, and not instituted upon indictment, properly overrules such application.
3. The gist of the offense in a prosecution for selling improperly labeled imitation extracts is the illegal sale, and the identity of the purchaser is not an essential element of the offense.

Charles C. Hall, for plaintiff in error.

Joseph McGhee, Attorney-General of Ohio, and *S. L. Connors*, contra.

KUNKLE, J.

Plaintiff in error was charged, tried and convicted before C. R. Hess, justice of the peace of Clinton township, Shelby county, Ohio, with selling to Stanley Bryan a certain quantity of an imitation vanilla extract for which no standard exists, and which was not labeled "artificial" or "imitation" and the formula printed in the manner provided for the labeling of "compounds" or "mixtures" and their formula, in this, to-wit: The word "artificial" and the formula were not printed upon the package as required by law.

Error was prosecuted from the judgment of said justice of the peace to the court of common pleas and the judgment of the justice of the peace was affirmed.

Error is now prosecuted to this court from the judgment of the court of common pleas affirming the judgment of the justice of the peace.

Various errors are assigned in the petition in error but the ones which are chiefly relied upon are:

(1). That the trial court erred in refusing to issue a commission upon the application of plaintiff in error, to take the testimony of Joseph O. Dea in the state of New York.

Section 10, Article I, of the Constitution in brief specifies that provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused the means and opportunity to be present in person and with counsel at the taking of such depositions.

The above constitutional provision merely authorizes the Legislature to make provision for the taking of a deposition.

It is optional with the Legislature to make such provision.

By virtue of this provision the Legislature of this state adopted Section 13668 of the General Code. This section provides that when an issue of fact is joined upon an indictment and a material witness for the defendant or for the state resides out of the state or, residing within the state, is sick or infirm or about to leave the state or is confined in prison, such defendant, or the prosecuting attorney may apply, in writing, to the court or a judge thereof in vacation, for a commission to take the deposition of such witness or witnesses. The court or judge may grant such commission and make an order stating in what manner and for what length of time notice shall be given to the prosecuting witness or to the defendant, before such witness or witnesses shall be examined.

It appears from a reading of this section that even when an issue of fact is joined upon an indictment a discretion is re-

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posed in the trial court as to whether such application should or should not be granted.

A reviewing court would therefore not be justified in reversing the ruling of the trial court thereon unless it clearly appeared from the record that the trial court had abused its discretion in refusing such request.

The record in this case does not disclose such a state of facts.

It being optional with the Legislature to make provision for the taking of such depositions the trial court could grant such application only in the cases specified by the Legislature.

The Legislature by Section 13668 limited the court's authority to grant such application in cases wherein an issue of fact was joined upon an indictment.

No indictment was returned in this case. No indictment could be returned before a justice of the peace.

The issue of fact was joined upon an affidavit, not an indictment, and we are of opinion that the justice of the peace for this reason did not err in overruling the application for the commission.

(2). It is also claimed by counsel for plaintiff in error that the affidavit in question should have charged that the sale was made to the Venus Chocolate Company instead of to Stanley Bryan, the agent and employee of the Venus Chocolate Company.

From an examination of the Ohio authorities cited in the brief of counsel for defendant in error we are clearly of opinion that the offense in question consisted of making the illegal sale.

The identity of the purchaser is therefore not an essential element of the offense and we do not think a material variance exists as claimed by counsel for plaintiff in error.

(3). It is further claimed that the article in question was sold to the Venus Chocolate Company as imitation vanilla; that said company knew exactly what they were securing; that the record fails to show that the proper label was not on this package when the same arrived in Sidney, and that therefore the judgment in this case is clearly against the weight of the evidence.

We have carefully read the record in this case insofar as it relates to the grounds of error urged by counsel for plaintiff in error.

We shall not undertake to discuss the testimony in detail, as counsel are familiar with the same, but from an examination of the record we would not feel justified in finding that the judgment is against the manifest weight of the evidence.

After a careful consideration of the record and authorities, we find no error in the record which we consider prejudicial to plaintiff in error and the judgment of the court of common pleas will be affirmed and cause remanded for execution.

ALLREAD, J., and FERNEDING, J., concur.

MECHANICS' LIEN MAY COVER MACHINE.

Court of Appeals for Hamilton County.

RULE V. THE AUTOMATIC NEWS DISTRIBUTING CO.

Decided, July 19, 1915.

Mechanic's Liens—Attaches to Machines—Where Not Permanently Attached to Land or Building—But Sold and Used on the Premises.

1. It is not necessary in order for a mechanic's lien to be effective that there must be real estate of the lien debtor to which it can attach.
2. Where machines are sold for and used in erecting, altering or repairing a manufactory of the purchaser, and such machines are not attached or fastened to the building or land in such a way as to make them permanent fixtures, the seller has a mechanic's lien upon such machines.

Gatch & McLaughlin, for the E. A. Kinsey Company.

Overbeck, Kattenhorn & Park, for Jos. W. Conroy, Receiver.

JONES (E. H.), J.

The question this court is called upon to decide pertains to the validity of a mechanic's lien held and sought to be enforced here-

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in by the E. A. Kinsey Company. The claim secured by the lien amounts to about \$972, with interest, which sum represents the value of two machines furnished by the E. A. Kinsey Company to the Automatic News Distributing Company, for which a receiver was appointed after the purchase of the machines.

It appears that the machinery in question has been sold by the receiver, and the proceeds are held under stipulation, subject to the determination of the question arising on said lien. This question of the validity of the lien arises in the action originally brought for the appointment of the receiver, upon the intervening petition of the E. A. Kinsey Company seeking the enforcement of its lien.

The questions involved and discussed in the able briefs of counsel are important. We regret that time will not permit a reference to and discussion of the cases cited by counsel in support of their respective contentions.

The main question is of much importance and merits careful consideration, which it has received at our hands. It involves the construction of Section 8308, General Code, which is as follows:

“Every person who does work or labor upon or furnishes machinery, material or fuel for constructing, altering, or repairing a boat, vessel, or other water craft, or for erecting, altering, repairing or removing a house, mill, manufactory, or any furnace or furnace material therein, or other building, appurtenance, fixture, bridge, or other structure, or for digging, drilling, boring, operating, completing or the repairing of any gas well, oil well, or other well, or performs labor in altering, repairing, or constructing any oil derrick, oil tank, oil or gas pipe line, or furnishes tile for the drainage of any lot or land by virtue of a contract, express or implied, with the owner, part owner or lessee, of any interest in real estate or the authorized agent of the owner, part owner, or lessee of any interest in real estate, shall have a lien to secure payment thereof upon such boat, vessel, or other water craft, or upon such house, mill, manufactory, furnace, or other building, or appurtenance, fixture, bridge, or other structure, or upon such gas well, oil well, or other well, or upon such oil derrick, oil tank, oil or gas pipe line, and upon the material or machinery so furnished, and upon

the interest, leasehold or otherwise, of the owner, part owner, or lessee in the lot or land upon which they may stand, or to which they may be removed."

The machines furnished by the E. A. Kinsey Company to the Automatic News Distributing Company were placed in a factory used for making vending machines. The space occupied by said factory was part of a factory building owned by the M. A. Hunt Company, and such space was leased by the Automatic Machine Manufacturing Company, by written lease duly recorded, prior to the purchase of the machines by the Automatic News Distributing Company from the E. A. Kinsey Company. These machines, it is admitted, form no part of the realty, and were not attached or fastened to the building or land in such a way as to make them permanent fixtures. In fact, one of the machines at the time the receiver was appointed had never been used. The question is: Does Section 8308, General Code, above quoted, authorize a lien upon this machinery in favor of the E. A. Kinsey Company? It is contended by the receiver that inasmuch as the lease was held by the machine company, instead of by the news company (which latter company, as will be borne in mind, purchased the machines), there can be no lien; that in order for the lien to be effective there must be some real estate of the lien debtor to which it can attach; and that this lease being held by another company makes it impossible for the E. A. Kinsey Company to acquire any rights as against the lessee.

There is some question raised by the evidence and the admitted facts as to whether these two companies were really different, or were, in fact, one company operating under two separate names. Under the view we take of this case this question becomes unimportant. The news company was without question operating this factory. Its name appeared over the door, The machine company had formerly operated a factory on Fourth street; the news company had taken over its machinery and equipment and removed it to the present location. Under these circumstances there can be no doubt but that the news company,

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the purchaser of these machines, was operating the plant. That there was a lease for the real estate on record, to some one else, does not change this fact.

It will be noticed that Section 8308, using only the words thereof that are applicable to this case, says:

“Every person who * * * furnishes machinery * * * for erecting, altering, repairing or removing * * * a * * * manufactory * * * shall have a lien to secure payment thereof upon such * * * manufactory * * * and upon the material or machinery so furnished, and upon the interest, leasehold or otherwise, of the owner, part owner, or lessee in the lot or land upon which they may stand or to which they may be removed.”

We have examined the cases cited in the briefs, as well as other authorities, and, after all, feel that we must be controlled by the provisions of the law of our state, so far as that law applies to the case before us. A mechanic's lien is purely a creature of the statute, and in every case involving a mechanic's lien the main question must necessarily be, What does the statute provide? We have asked ourselves that question in this case, and will answer it by saying that we believe Section 8308, General Code, gives the E. A. Kinsey Company a right of lien upon the two machines furnished by it, and which were used in *erecting, altering or repairing the manufactory* of the person with whom it contracted for the sale of the machines.

Authorities are cited, and are numerous, in support of the proposition that a lien could not have been secured upon these machines, or upon other machines placed as these were in a factory, by some one who had furnished labor or material for the construction of the building wherein the factory was located. It is obvious that in such a case a mechanic's lien could only be obtained upon the building and such machinery as was a part of it under the law relating to fixtures.

The question here presented is not such a question as is discussed in those cases. The E. A. Kinsey Company only claims a lien upon the two machines which it sold and which went into

and became a part of the factory. They were machines that were necessary, and that greatly added to the output and efficiency of the factory.

By its intervening petition the lien holder does not seek to enforce a lien upon the real estate, the leasehold, or any property, real or personal, except these two machines. The statute, under a fair construction, as we think, gives it the lien which it seeks to enforce. In support of this construction we refer to the case of *E. A. Kinsey Co. v. Heckermann, Trustee*, 224 Fed. Rep., 308, 139 C. C. A., 544. By reference to that decision it will be found that the learned judge so construed Section 8308 of the General Code of Ohio as to uphold the lien contended for by the E. A. Kinsey Company in this case.

The prayer of the intervening petition will therefore be granted.

Judgment accordingly.

JONES (Oliver B.), J., and GORMAN, J., concur.

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VALIDITY OF ORDINANCE AGAINST LOITERING.

Court of Appeals for Hamilton County.

IN RE BALDRIDGE (BADER, SUPERINTENDENT, V. MCCARTIN).

Decided, May 10, 1915.

*Loitering—May be Punished Under the Act Relating to Vagrancy—
Habeas Corpus for Release of One Found Guilty of Loitering—
Section 3664.*

While cities are without authority to punish loiterers as such, they have ample authority to punish vagrants, and an ordinance passed in the exercise of such power is not invalid because the word "loitering" is used in defining the offense, and in creating the class of vagrants contemplated.

Walter M. Schoenle, City Solicitor, and E. S. Morrissey, Prosecuting Attorney of Municipal Court, for plaintiff in error, Ferd Bader, superintendent of the Cincinnati workhouse.

Jas. J. McCartin, *in propria persona* and for John Baldridge.

JONES (E. H.), P. J.

John Baldridge was convicted of a violation of Section 907 of the ordinances of Cincinnati, which we reproduce below.

Baldridge was discharged from prison by the insolvency court on a writ of habeas corpus, on the ground that said ordinance is invalid. In so deciding, it appears that the learned judge felt bound by the decision of the circuit court in *In re Opal Howard*, 15 C.C.(N.S.), 171. The court in that case held that the ordinance upon which that prosecution was based was invalid for the reason that the state of Ohio through its General Assembly had not delegated to the city the power to pass such an ordinance.

This calls for a comparison of the ordinances to see whether or not the present ordinance bears the infirmity which was pointed out in the ordinance involved in the Howard case. That ordinance reads as follows:

"Section 907. If * * * any person shall be found loitering about any common barroom, dram shop, gambling house or house of ill-fame, or wandering about the streets either by night or day without any lawful means of support," etc., such person shall be fined, etc.

The agreed statement of facts embodied in the bill of exceptions herein states that Baldrige "was arrested and prosecuted by virtue of Section 907 of the Code of Ordinances of the city of Cincinnati, passed February 4, 1913, which section reads as follows:

"'Be it ordained by the Council of the City of Cincinnati, State of Ohio.

"'Section 1. That Section 907 of the Code of Ordinances be amended to read as follows: Section 907. LOITERING—Any person found loitering about any street, alley, avenue, park or public or private place within the city of Cincinnati without legal means of support, who being able to work for the support of himself or herself at honest industry, intentionally lives idly and without endeavoring in good faith to obtain lawful work or employment, shall be deemed a vagrant and, on conviction thereof, shall be fined not less than one or more than fifty (\$50) dollars for each offense.'

"That the said John Baldrige was tried on or about the 23d day of February, 1915, and convicted of said offense."

Some question was raised in oral argument about the affidavit upon which Baldrige was arrested, and the claim was made that it did not state facts sufficient to constitute an offense under the present ordinance.

The papers in the case in the municipal court were not in evidence in this case. No documents are attached to the bill of exceptions, and it contains copies of none. This case was submitted to the insolvency court on an agreed statement of facts, to which reference has been heretofore made. That statement of facts contains no reference to the affidavit for arrest and it can not be regarded as part of the record in the case under review.

The record here presents but one question, *i. e.*, the validity of the ordinance of February 4, 1913. It shows that Baldrige

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was arrested, prosecuted and convicted for its violation. This ordinance defines "vagrancy" and fixes a penalty therefor.

Section 3664, General Code, authorizes such legislation by a municipality:

"Section 3664. To provide for the punishment of persons disturbing the good order and quiet of the corporation, by clamor and noise in the night season, by intoxication, drunkenness, fighting, using obscene or profane language in the streets and other public places to the annoyance of the citizens, or otherwise violating the public peace by indecent and disorderly conduct, or by lewd or lascivious behavior. In like manner to provide for the punishment of any vagrant, common street beggar, common prostitute, habitual disturber of the peace, known pickpocket, gambler, burglar, thief, watch-stuffer, ball-game player, a person who practices any trick, game or device with intent to swindle, a person who abuses his family, and any suspicious person who can not give a reasonable account of himself."

The former ordinance which was declared invalid in *In re Opal Howard* differed from this in that it prohibited "loitering" only, and made no mention of "vagrant" or "vagrancy."

While the statute gives authority to punish all vagrants, the ordinance only embraces by its terms a class of vagrants described therein, and in this respect the lawmaking body of the city has not exercised all the power granted to it. By the former ordinance it was sought to punish loiterers, not all loiterers, but only such as were described therein. But it was invalid, and so decreed, because of the lack of any authority in cities to punish "loiterers," as such. There is given ample authority to punish vagrants, and this ordinance passed in the exercise of such power is not to be overthrown because the word "loitering" is used in defining the offense, and in creating the class of vagrants contemplated.

We are of the opinion, therefore, that the city acted entirely within the power delegated by said Section 3664, General Code, in passing the existing ordinance, and that it is a valid enactment.

Judgment reversed.

JONES (Oliver B.), J., and GORMAN, J., concur.

**AS TO THE RUNNING OF THE STATUTE OF LIMITATIONS
IN CASE OF TRESPASS.**

Court of Appeals for Stark County.

THE LOUISVILLE BRICK & TILE CO. v. CALMELAT ET AL.

Decided, March 24, 1917.

Trespass—Application of the Statute of Limitations to a Continuing Trespass or Nuisance—Emission of Smoke, Soot and Gas Upon the Lands of Another.

1. Under the doctrine of permanent trespass or nuisance, for which but one action lies, and for which damages may be awarded *in solido*, when a man commits an act of trespass upon another's land, and thereby injures such other at once and to the full extent that such act will ever injure him, he is liable at once for this one act and all its effects; and the time of the statute of limitations runs from the time of such act of trespass.
2. When an owner of land rightly and lawfully does an act entirely on his own land, and by means of such act puts in action, or directs a force against, or upon, or that affects, another's land, without such other's consent or permission, such owner or actor is liable to such other for the damages thereby so caused the latter, and at once the cause of action accrues for such damages; and such force, if so continued, is continued by an act of such owner or actor, and may be regarded as a continuing trespass or nuisance; and each additional damage thereby caused is caused by him and is an additional cause of action; and until such continued trespass or nuisance by adverse use ripens into and becomes a presumptive right and estate in the former, the latter may bring his action.

*A. M. McCarty and John C. Welty, for plaintiff in error.
Hart & Koehler, contra.*

POWELL, J.

The parties stand in this court in the inverse order to that in which they stood in the court below, the plaintiff in error being defendant in that court, and the defendants in error, plaintiffs. We will refer to them in this opinion in the order in which they stood in the trial court.

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The plaintiffs are the owners of a tract of land described in the petition. The defendant is a manufacturer of brick, tile and other clay products. Its plant is located immediately west of the premises of plaintiffs. It owns and operates continuously sixteen tile or brick kilns, and had so owned and operated said plant for more than four years immediately preceding the commencement of this action. In the manufacture of its products it is alleged that large quantities of smoke, soot, cinders and gas constantly emanate from its kilns, and the same are cast over and upon plaintiffs' said lands, the comfort of plaintiffs interfered with, and said lands depreciated in rental value by reason thereof, to plaintiffs' damage in the sum of \$2,000, for which they ask judgment.

On the trial of the action in the court below, plaintiffs recovered judgment. Defendant seeks a reversal in this court.

The principal contention of the parties is as to the application of the statute of limitations, which is pleaded as a defense. The first kilns of the defendant were built in 1892. There were eight of them. In the year 1900 the plant was destroyed by fire. It was then rebuilt and eight more kilns added, and it has been operated continuously from 1901 until the present time with sixteen kilns. The proper judgment to be rendered depends on the character of the trespass complained of. If it is what, in law, is known as a permanent nuisance, then a cause of action arose in favor of plaintiffs when the first eight kilns were constructed in 1892, and any right of recovery was barred by the statute of limitations at the commencement of this action.

"When a man commits an act of trespass upon another's land, and thereby injures such other at once and to the full extent that such act will ever injure him, he is liable at once for this one act and all its effects; and the time of the statute of limitations runs from the time of such act of trespass." *Valley Ry. v. Franz*, 43 Ohio St., 623, 625.

This is the doctrine of permanent trespass or nuisance, for which but one action lies, and for which damages may be awarded *in solido*. It is wholly an action for trespass. *Williams v. Pomeroy Coal Co.*, 37 Ohio St., 583; *P. Ballantine & Sons v. Pub.*

Service Corp., 86 N. J. L., 331, L. R. A., 1915A., 369, and *Downs v. Greer Beatty Clay Co.*, 9 C.C.(N.S.), 345.

A private or continuing nuisance is defined to be:

"Anything done to the hurt or annoyance of the lands, tenements or hereditaments of another, and not amounting to a trespass." 3 Stephen's Commentaries (1st Ed.), 499, and *Goodall v. Crofton*, 33 Ohio St., 271.

"The business of burning brick is a lawful one, and whether or not it is a private nuisance depends upon the circumstances of each particular case." *Downs v. Clay Co.*, *supra*, 345.

"And when the owner of land rightly and lawfully does an act entirely on his own land, and by means of such act puts in action, or directs a force against, or upon, or that affects another's land, without such other's consent or permission, such owner or actor is liable to such other for the damages thereby so caused the latter, and at once a cause of action accrues for such damages; and such force, if so continued, is continued by the act of such owner and actor, and it may be regarded as a continuing trespass or nuisance; and each additional damage thereby caused is caused by him and is an additional cause of action; and until such continued trespass or nuisance by adverse use ripens into and becomes a presumptive right and estate in the former, the latter may bring his action." *Valley Ry. Co. v. Franz*, 43 Ohio St., 623, 627, and *City of Mansfield v. Hunt*, 19 C. C., 488.

There are numerous authorities in Ohio and elsewhere supporting the doctrines above laid down. The court in the instant case is required to decide which of the two kinds of action is presented by the record.

The petition alleges that the defendant, by reason of the smoke, soot, cinders and gas emitted from defendant's kilns and cast upon plaintiffs' lands, "has injured the vegetation, crops and shrubbery growing upon plaintiffs' premises" within the four years immediately preceding the commencement of the action.

It further alleges "that by reason of the soot, cinders and offensive gases so cast upon and about the premises of plaintiffs, the comfort of the plaintiffs has been interfered with, said

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premises rendered uncomfortable for habitation, and greatly depreciated in rental value, for said period of four years, all to the injury and damage of the plaintiffs in the sum of two thousand dollars."

The complaint last above quoted is certainly of the character of a permanent trespass or nuisance, for which but one action for damages can be maintained, and that action is barred by the four-year statute of limitations.

The charge first above quoted for damages to "vegetation, crops and shrubbery" of plaintiffs is as plainly a continuing trespass, for which an action will lie, as the other is a permanent trespass, and upon this charge alone the court finds plaintiffs were entitled to recover in this action; and there being no other error prejudicial to the rights of the plaintiff in error complained of, or shown by the record, the court has arrived at the conclusion that said judgment should be affirmed.

Judgment affirmed.

SHIELDS, J., and HOUCK, J., concur.

**INJURY TO WOULD BE PASSENGER WHILE STEPPING
ON STREET CAR.**

Court of Appeals for Hamilton County.

THE CINCINNATI TRACTION CO. V. WEBER.

Decided, May 16, 1914.

Negligence—One Stepping on Street Car—Injured by Sudden Starting of Car—Effect of Reading Petition as Part of Charge to Jury—Allegation Not Supported by Evidence—Rendered Harmless by Subsequent Instruction to Jury—When One Becomes a Passenger on a Street Car.

1. One is a passenger in a street car who is in the act of stepping on the step or platform, the car having stopped for him; and in case of an accident when stepping on, his rights are those of a passenger. In an action for damages on account of personal in-

juries due to the sudden starting of a street car under such circumstances, it is not error for the trial court to refuse to incorporate in the charge to the jury a statement that to warrant a finding that the plaintiff was a passenger the jury must find that the conductor knew, or by the exercise of ordinary care should have known, that the plaintiff was about to board the car while it was at a standstill.

2. It is not error for the court to read to the jury the entire petition, which petition sets forth an element of damage not supported by any evidence, where the court, in the portion of the charge which followed the reading of the pleadings, did not make any allusion to the element of damage which was unsupported by evidence, but on the contrary mentioned the different elements of damage which would go to make up the verdict of the jury in case they should find in favor of the plaintiff.

Kittredge & Wilby and R. E. Simmonds, for plaintiff in error.
Bettinger, Schmitt & Kreis, contra.

JONES (E. H.), J.

In the action below the defendant William F. Weber was plaintiff, and in his petition sought damages on account of personal injuries alleged to have been sustained by him on the afternoon of October 23, 1910.

In his petition it is alleged that on said day "one of defendant's North Norwood cars being operated over Montgomery pike, inwardly bound for the said city of Cincinnati, stopped on the bridge which crosses the tracks of the Baltimore & Ohio Southwestern Railroad, in said city of Norwood, which said point is a regular stopping place, for the purpose of taking on passengers to be conveyed to Cincinnati.

"That while said car was standing still, after having stopped as aforesaid, this plaintiff started to board the same, and took hold of the rear post with his left hand and put his right foot on the step of said car, and was attempting to board the same for the purpose of being conveyed to Cincinnati, when said car, through the negligence and carelessness of the agents and servants of said defendant, and before this plaintiff had ample opportunity to board the same and reach a place of safety, suddenly and without any notice or warning to this plaintiff, started

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with a violent and unusual jerk or motion, whereby this plaintiff, without any fault or negligence on his part, but solely through the negligence of said defendant, was violently thrown to the street," etc.

The trial resulted in a verdict in favor of the plaintiff below, and this proceeding in error is prosecuted for the purpose of reversing the judgment in his favor entered upon said verdict.

Two assignments of error are relied upon by plaintiff in error in the brief and oral argument of counsel.

The first error assigned is in the charge of the court. The plaintiff in error in its brief says:

"We submit that there is error in the charge of the court to the jury with reference to whether or not the plaintiff at the time the accident occurred, was a passenger, and, as such, entitled to demand from the defendant that it exercise toward him the highest degree of care as defined by the court below in his charge to the jury."

The brief then quotes the following portion of said charge:

"Now, coming down to this particular case, if the plaintiff was in the act of getting on the car, taking hold of the car, and was in the act of getting upon the car, he was then entitled to the rights of a passenger and the obligations existing between the company and the plaintiff are those to which I have already referred: ordinary care on the part of the passenger to take care of himself and avoid dangers, and the highest degree of care on the part of the defendant, if, as I say you find from the evidence that the plaintiff had become a passenger. In other words, that he had laid hands upon the car, and had endeavored to get upon it. Also it must be before the car was in motion."

Counsel for plaintiff in error point out that this portion of the charge was erroneous in that the trial judge did not incorporate in it something to the following effect:

"And if the jury should find that the conductor knew, or by the exercise of ordinary care should have known, that the plaintiff was about to board the car while it was at a standstill."

It is admitted in the answer of the defendant below that the place where the accident occurred was a regular stopping place

for taking on and letting off passengers. There is no question, from the evidence, but that the car stopped for the purpose of taking on a group of persons who were waiting for the car. It is also uncontradicted that the plaintiff below was among those who were waiting to board the car. These facts having been proven, and their being no evidence tending to rebut the same, it is unnecessary, in the opinion of the court, for the trial court to incorporate in its charge any condition with reference thereto such as that quoted above from the brief of counsel for plaintiff in error. The motorman and conductor both testified that the car stopped at this regular stopping place for the purpose of taking on these would-be passengers, thus extending to them an invitation which was accepted by several persons as soon as they respectively laid hold upon the car for the purpose of entering the same.

This principle of law seems to be well established, and is concisely stated in I Nellis on Street Railways (2d Ed.), Section 252, as follows:

“One is a passenger in a street car who is in the act of stepping on the step or platform, the car having stopped for him, and in case of an accident when stepping on, his rights are those of a passenger.”

Under the undisputed facts as stated above, we conclude that the charge of the court, or the portion thereof above quoted, contains a complete statement of the law as applicable to this case.

The second and last assignment of error complained of is stated in the brief for plaintiff in error as follows:

“We submit that the court below also erred in submitting to the jury, by reading the petition, elements of damage claimed in the petition which were not supported by any evidence. We refer to the following portion of the petition as included in the charge: ‘That he was unable to attend to his grocery business but has had to employ extra help in order to carry on the same, during which time, because of the lack of his personal attention, he has lost several customers and has otherwise sustained losses in said business.’”

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The bill of exceptions shows that the court read to the jury the entire petition, including the language just quoted. It is conceded that there was no evidence to support in any way this allegation in the petition. It is not claimed that the court in the portion of the charge which followed the reading of the pleadings made any allusion to this element of damage which was unsupported by evidence; on the contrary, the court mentioned the different elements of damage which would go to make up the verdict of the jury in case they should find in favor of the plaintiff, and nowhere did it make any mention of the loss of business complained of in the petition. It would be a sad reflection on the intelligence of the twelve men who made up the jury to assume, in the face of the charge of the court upon the elements which constituted the damage and upon the necessity of proof to support each of the claims, that they would proceed to award damages upon a claim in the petition which was abandoned by the plaintiff in the trial of the case and which had no evidence whatever in its support.

After a careful examination of the record, and a consideration of the points advanced by counsel for plaintiff in error, we are persuaded that there is no error in any manner prejudicial to the plaintiff in error; that substantial justice has been done; and that the judgment below should be affirmed.

Judgment affirmed.

JONES (Oliver B.), J., and SWING, J., concur.

WRIT OF PROHIBITION MUST BE BASED ON WANT OF JURISDICTION.

Court of Appeals for Franklin County.

THE KANAWHA & MICHIGAN RAILWAY CO. v.
THE COURT OF COMMON PLEAS ET AL.

Decided, March 7, 1916.

Prohibition—Writ of, Distinguished from Writ of Error—Can Only be Invoked where there is an Absolute Lack of Jurisdiction.

1. The writ of prohibition can not be made a substitute for a proceeding in error, and in order to invoke this writ there must be an absolute want of jurisdiction.
2. Jurisdiction is determined by the pleadings, and when the petition contains an averment sufficient to invoke the jurisdiction of the court, the question of jurisdiction must be met by tendering an issue of fact which the court has jurisdiction to decide and the decision of which may be reviewed on error. This rule is not changed by an admission of counsel that the averment in question is not supported by the facts. Under such conditions the remedy is error and not prohibition.

W. N. King and E. J. Jones, for applicant.
In prohibition.

FERNEDING, J.

An *ex parte* application is made for a writ of prohibition against further proceedings in the case of Clarence C. Casebolt against the applicant in a proceeding pending in the Court of Common Pleas of Franklin County. This writ can not be made a substitute for a proceeding in error. *State, ex rel Broenstrup, v. The Court of Common Pleas of Montgomery County* (decided by the Supreme Court June 3, 1913, 11 O. L. R., 72), and *State, ex rel Garrison, v. Brough et al*, 94 Ohio St., 115.

In order to invoke the writ, there must be an absolute want of jurisdiction. Jurisdiction is determined by the pleadings. It is admitted in the case at bar that the petition contained an

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averment that the applicant's railroad extended into Franklin county. This averment was sufficient to invoke the jurisdiction of the Court of Common Pleas of Franklin County. The case is similar to that of a party brought in from another county because of a joint liability with a party over whom the court has jurisdiction. See *Allen v. Miller*, 11 Ohio St., 374.

In such case the question of jurisdiction must be met in that case by tendering an issue of fact which the court has jurisdiction to decide and the decision may be reviewed on error. We think this rule is not changed by the fact that counsel for the plaintiff in the action in the court of common pleas admitted on the hearing of a motion to dismiss for want of jurisdiction that the railway company did not extend into Franklin county. This admission formed no part of the pleadings and would be merely evidence upon which the court of common pleas might be justified in acting in determining the issue of fact as to jurisdiction.

We have therefore reached the conclusion that the applicant's remedy is error and not prohibition.

Application refused.

KUNKLE, J., and ALLREAD, J., concur.

TOWNSHIP DITCH PROCEEDINGS.

Court of Appeals for Clinton County.

BOARD OF TOWNSHIP TRUSTEES OF WILSON TOWNSHIP V.
GILBERT ET AL.*

Decided, February 22, 1915.

Ditches—Township Trustee May Petition for Township Ditch in His Capacity of Property Owner—Request for Tiling Not Necessary, When.

1. It is unnecessary, when township trustees are proceeding under a petition containing an express prayer for the tiling of a ditch, that one or more of the parties interested should make a written request, at the hearing of the petition, that the tiling be done.
2. There is no inhibition against an owner of real estate filing or joining in a petition to township trustees for an improvement of a ditch, merely because at the time he happens to be a member of the board of township trustees, and the proceedings for such improvement are not invalid where the record shows that such trustee took no part, as trustee, in the proceedings by the board of trustees in relation to the matter, and that all proceedings were conducted by the other members of the board who constituted a quorum and had power to act.

Joe T. Doan, Prosecuting Attorney, *P. B. Aldridge* and *James M. Morton*, for plaintiff in error.

W. I. Stewart and *Hayes & Hayes*, contra.

JONES (E. H.), J.

A petition in error was filed in this court seeking a reversal of the judgment of the court of common pleas in setting aside the action of the township trustees of Wilson township in certain proceedings had before said trustees for the cleaning, altering and tiling of a certain ditch.

This ditch was originally constructed about the year 1903,

*Motion for an order requiring the Court of Appeals to certify its record in this case overruled by the Supreme Court April 6, 1915.

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and the petition filed with the township trustees, upon which the proceedings under review are based, prayed that "you may establish, deepen, straighten, alter the course of if necessary, and tile with proper underground drain tile that part of the township ditch known as the Aaron Gilbert Ditch petitioned for by Aaron Gilbert and located and established the trustees of said township about August, 1903, described as follows:" etc.

It was held by the common pleas court on petition in error that under such a petition the township trustees had no authority to order that said ditch or any part thereof be tiled, unless one or more of the parties interested should make a written request, at the hearing of the petition, that tiling be done, in accordance with the terms of Section 6614, General Code.

This section has application, as we think, to proceedings in the establishment and construction of a ditch where the petition does not contain an express prayer for tiling. The proceeding under review, however, was manifestly brought under Section 6644, General Code, which relates to altering, deepening, widening, enlarging, repairing, boxing or tiling a ditch already established and constructed, as was this Gilbert ditch:

"Section 6644. The trustees may cause a ditch, or part thereof, located and constructed under any law, to be altered, deepened, widened, enlarged, repaired, boxed or tiled, and like proceedings shall be had, so far as applicable, as is required in the location and construction thereof. The expense thereof shall be apportioned as is provided in this title for original construction."

The petition filed with the trustees, out of which this controversy arose, asks, among other things, that the ditch be tiled. The transcript of the proceedings before the township trustees shows, by written objections filed and claims of various kinds presented by those interested, that the tiling was an important part of the improvement under consideration.

It seems to us that it would be a vain thing in such a proceeding to require those desiring an enclosed ditch, or a tiled ditch, to renew this prayer, or to file any sort of a written request, when

the original petition, as we have said, clearly embraced the tiling of the ditch.

Counsel for defendants in error lay stress in their brief upon the fact that Mr. Peele, petitioner for the improvement, was at the time the petition was filed and during the pendency of the proceedings, a member of the board of township trustees, and that by reason of his holding his said position he had no right to file the petition.

The statute provides that a majority of the board of township trustees may act in any matter, and we find no inhibition against an owner of real estate filing or joining in a petition for an improvement of a ditch merely because at that time he happens to hold the office of township trustee or other office. The record shows that he took no part, as trustee, in the proceedings by the board of trustees in relation to this matter, but that all proceedings were conducted by the other members of the board, who constituted a quorum and had power to act.

We find that there was error in the judgment of the common pleas court in reversing so much of the proceedings of the trustees as ordered the ditch to be tiled.

We have examined the other errors assigned in the petition in error filed in the common pleas court, and fail to see where there was any departure from the provisions of the statute in the action of the trustees.

Judgment reversed.

SWING, P. J., and JONES (Oliver B.), J., concur.

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**EXPERT OPINIONS BY PHYSICIANS AS TO INJURIES
SUFFERED.**

Court of Appeals for Lucas County.

THE TOLEDO RAILWAYS & LIGHT COMPANY V. MARY PRUS.

Decided, March 31, 1917.

Professional Opinions—Where Given by Physicians as to Injuries Sustained—Can Not be Based on Statements Made by the Injured Party—Objections to Evidence Must be Promptly Made—Damages for Injuries Suffered Must be Limited to those Reasonably Certain to Result from the Injury.

1. A physician who makes an examination of one who has received physical injuries, for the sole purpose of enabling him to testify as an expert in an action to recover damages for such injury, can not testify to statements made by the party as to her condition, and an opinion given by the physician must not be based in any substantial degree on statements of the injured party as to subjective symptoms.
2. In general, a physician when testifying as an expert should be able to state to the jury, before giving his opinion, that such opinion is based upon his examination of the person without being affected in any substantial degree by the relating to him by the person of subjective symptoms.
3. The law imposes upon every litigant the duty of vigilance in the trial of a case, and he can not permit incompetent evidence to be introduced without objection or without seeking to have the same excluded, with reasonable promptness, and at the conclusion of the trial, especially after argument of the case to the jury, predicate error upon the refusal of the court to exclude such evidence from the jury at that stage of the trial.
4. Witnesses can not be interrogated as to matters wholly collateral merely for the purpose of contradicting them by other evidence, and if questions of this character are answered the answer can not be contradicted by the cross-examiner.
5. Where prospective damages from an injury are claimed, they should be limited by the court in its charge to the jury to such as the evidence shows are *reasonably certain* to result from the injury, and it is error to charge that recovery may be had for "such future pain and suffering as you find from the evidence is *liable* to ensue."

Tracy, Chapman & Welles, for plaintiff in error.
Sala & Carabin, contra.

CHITTENDEN, J.

Error to the court of common pleas.

The plaintiff in the court of common pleas, Mary Prus, recovered a verdict and judgment against the defendant, the Toledo Railways & Light Company, in the sum of twenty-five hundred dollars as damages for injuries sustained by being thrown from a street car while in the act of alighting therefrom.

The defendant admits that the plaintiff was, on the date of the accident, to-wit, the 7th day of December, 1915, upon one of the cars of the defendant, and that in attempting to dismount therefrom she fell to the pavement. The defendant denies all allegations of negligence upon the part of the defendant, and pleads in the alternative that if it was in any wise negligent, the plaintiff was guilty of negligence directly contributing to her injuries in that she attempted to dismount from a moving car.

The first error relied upon for reversal of the judgment is that the verdict and judgment are against the weight of the evidence. Without entering into a discussion of the evidence, we deem it sufficient to state that after an examination of the record we are unable to find that the verdict and judgment are contrary to the evidence or are not sustained by sufficient evidence.

It is further claimed that the judgment should be reversed because of the excessive amount of the verdict. The case has been twice tried in the court of common pleas and two juries have assessed the damages of the plaintiff in the same amount, and we are unable to find from the evidence that the verdict is so excessive in amount as to justify a reversal on that ground.

Upon the cross-examination of two physicians who were called as expert witnesses on behalf of the plaintiff, it was shown that the opinion expressed by them was based in part on statements made by the plaintiff to them as to her subjective symptoms, as well as her recital of the history of the case. Neither of these physicians was treating the plaintiff for her injuries, but they

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were called only for the purpose of making an examination with a view to giving expert testimony. One of the witnesses states that, regardless of any statements made by the plaintiff, he thought his diagnosis would be the same, namely, that the plaintiff was suffering from traumatic neurasthenia. No motion was made on behalf of the defendant at the time of the examination of the witnesses to exclude their opinion evidence from the jury upon the ground that it was based in part upon statements made by the plaintiff to them of her subjective symptoms. At the close of the arguments, but not before, the defendant requested the court to charge the jury with respect to each of these physicians, that no weight should be given to their opinions, based in part upon the statements made to them by the plaintiff as to her subjective symptoms and the history of her case, that she has traumatic neurasthenia. These requested instructions were refused and such refusal is claimed to constitute prejudicial error.

We find no error in the action of the court in so refusing to give these requested instructions. This court has in many cases followed the decision of the Supreme Court of this state in *Pennsylvania Co. v. Files*, 65 O. S., 403, which established the rule that when one who has received a physical injury calls upon a physician for the sole purpose of enabling the physician to testify as an expert in a suit for damages on account of such injury, statements made by the party under such circumstances in regard to his condition are not admissible in evidence. Counsel for plaintiff contends that this rule was not violated in this case for the reason that the physicians were not called upon to testify to any statements made by the plaintiff to them, and, indeed, this is true. In direct examination it did not appear that their opinion was based in any part upon statements made by the plaintiff. This fact was elicited by cross-examination, and the cross-examination, of course, did not call for any statements made by the plaintiff to the physicians. It only developed the fact that such statements had been made to the physicians and that their opinion was in part based upon such statements. It may well be that a physician who is called for the purpose

of examining a plaintiff with a view to giving expert testimony may find it important, and even quite necessary, to ask some questions of the plaintiff. Indeed, the nature of the malady might be such that the statements would be the only means of determining the malady. For example, if it was claimed that there was a mental disturbance resulting from an injury, questions asked by a skillful physician would be one of the proper means of determining the truth or falsity of the claim. But in general a physician when testifying as an expert should be able to state to the jury, before giving his opinion, that such opinion is based upon his examination of the plaintiff without being affected in any substantial degree by the relating to him by the plaintiff of subjective symptoms. It seems entirely clear that if the physician is precluded from relating to the jury the statements made by the plaintiff in regard to her condition, on the ground that such statements were made without the sanction of an oath and under such circumstances as tend to cause her to exaggerate her feelings or even to make false statements with reference to them, that it is equally obnoxious to correct procedure to permit the witness to give to the jury an opinion based in any substantial degree upon those same statements of the plaintiff.

We hold that the opinion evidence of Dr. Baldwin, which was based, as he said, in part upon plaintiff's statements to him as to her subjective symptoms, was incompetent; and the opinion evidence of Dr. Ritchie, in so far as it was based in part upon similar statements of the plaintiff, was incompetent. The latter witness, however, testified that his diagnosis and opinion would have been the same even if such statements were excluded from his consideration.

This court has discussed this class of evidence in a number of cases, and especially in the case of *Toledo Railways & Light Co. v. Yahnke*, decided February 9, 1914. We deem it unnecessary to add anything to what was said upon this subject by this court in the opinion in that case, but call attention to the following authorities cited therein: *Lee v. K. C. Southern Ry. Co.*, 206 Fed., 765; *Railroad Co. v. Huntley*, 38 Mich., 537, 544; *Shaugh-*

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nessy v. Holt, 236 Ill., 485, same case, 21 L. R. A. (N. S.), 826.

The ruling of the court upon this evidence was not erroneous, however, for the reason that objection to the evidence was not seasonably made. One can not permit incompetent evidence to be introduced in a case without objection or without seeking to have the same excluded with reasonable promptness, and at the conclusion of the trial, especially after argument of the case in which it is to be presumed that such evidence, together with all other evidence, was analyzed and discussed before the jury, predicate error upon the refusal of the court to exclude such evidence from the jury at that stage of the trial. (*State v. Kollar*, 93 O. S., 89, 91; 5 Enc. of Evidence, page 616.) Such an application to exclude the evidence should in all fairness be made while the witnesses are in court and the opportunity is available for the party who called the witnesses to re-examine them, if he sees fit, on the point in question, and avoid the loss of their testimony in so far as it is competent.

Upon the cross-examination of the plaintiff she was asked if she had ever received any other injury and she answered in the negative. Thereupon she was confronted with a statement signed by her in which was set forth an injury received by her in 1912 because of being thrown from a car while in the act of alighting therefrom; also by a receipt for forty dollars in full settlement of a claim made by her against the Toledo Railways & Light Company for such injury. The defendant thereafter called a conductor in its employ and sought to prove by him that on the date and at the time of such claimed accident there was in fact no such accident. This evidence was excluded and it is claimed that the court erred in so doing. The evidence as to the former accident was entirely collateral to the issues involved in the case on trial and was claimed to be competent only for the purpose of impeaching the plaintiff and tending to show that her claim was fraudulent. The rule governing the cross-examination of a party upon matters collateral to the issue is well stated in Jones on Evidence, Section 827, as follows:

“Although witnesses may often be questioned on cross-examination as to matters collateral to the issue, for the purpose of

testing their credibility, it is a well settled rule that witnesses can not be interrogated as to matters wholly irrelevant merely for the purpose of contradicting them by other evidence. Hence, if questions of this character are answered the answer can not be contradicted by the cross-examiner. * * * Any other rule would lead to the trial of innumerable issues, the distraction of the attention of the jury from the main question on trial, and would subject witnesses to the injustice of being compelled to be prepared on all occasions to support this testimony by that of other witnesses upon subjects having no connection with the issue."

The court was undoubtedly correct in its limitation of the examination upon this collateral question.

Plaintiff in error complains of the general charge upon the subject of the assessment of damages for future pain and suffering. The charge upon that subject is as follows:

"If you find from the testimony that those injuries are permanent you can incorporate in your assessment of damages for such future pain and suffering as you find from the evidence is liable to ensue."

And again:

"You may include what, if any, amount the testimony shows such expense to have been, together with any amount which you may find from the testimony she is reasonably liable to incur in the future therefor."

The rule upon this subject has been so clearly stated by the Supreme Court in the case of *Pennsylvania Co. v. Files, supra*, that little need here be said with reference to this part of the charge. In that case the rule as stated in the syllabus is:

"Where prospective damages from an injury are claimed, they should be limited by the court in its charge to such as may be reasonably certain to result from the injury."

This rule has been often followed by this court and we especially call attention to the discussion of the rule in the opinion in the case of *Edward Poland, Guardian, etc., v. Toledo Railways & Light Co.*, 27 O. C. A., 105. The word "liable" used by

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the court in the case at bar is no more than the equivalent of "may." By the use of this word in the charge the jury were justified in considering any damage that might by any contingency or possibility ensue in the future.

In addition to the cases cited in the opinion in the Poland case we call attention to the following: *Green v. Catawba Power Co.*, 75 S. C., 102, in which case the word "liable" was used in the charge in the same sense as in this case and its use was condemned and held to be prejudicial error. Also: *Ayers v. D., L. & W. R. R. Co.*, 158 N. Y., 252; *Stutz v. C. & N. W. Ry. Co.*, 73 Wis., 147; *Louisville S. R. Co. v. Minogue*, 90 Ky., 369; *Ford v. Des Moines*, 106 Iowa, 94; *McBride v. St. Paul City Ry. Co.*, 72 Minn., 291.

Counsel for defendant in error call attention to the concluding statements in the opinion of the Supreme Court in *Pennsylvania Co. v. Files* in which it is said that inasmuch as the attention of the trial court was not called to the error in the charge upon the subject of future damages at the time the charge was given, they might not, if that were the only error, have reversed the judgment. It is claimed that the attention of the trial court in the case at bar was not called to this error and that the judgment ought not to be reversed for that reason. In some classes of personal injury cases we might entirely agree with the contention of counsel. For example, if the permanency and extent of an injury are manifest, and the injury is of some such character as to show that future damage must follow, as, for instance, in the loss of a limb or any eye, we might not be disposed to disturb the verdict for an error of the kind just mentioned. In the case at bar, however, the immediate physical injury does not appear to have been very great, and the principal damage, as claimed, arises solely from a nervous disturbance claimed to have resulted from such injury. Neurasthenia, which the plaintiff claims resulted from her injuries, is well known to be of such character that its duration is extremely uncertain. It therefore becomes extremely important not only that the expert evidence should be kept within proper and legal bounds, but that the charge of the court on the measure of damages should

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be correct and accurate. As was said in the Poland case, the witnesses testifying upon this subject may not, upon all features of the question, be inclined to speak with entire certainty. Nevertheless, when the court comes to state the rule of law to the jury it must be stated with accuracy.

We therefore hold that the charge as given was erroneous and prejudicial to the rights of the plaintiff in error, and for that reason the judgment will be reversed and the cause remanded for new trial.

KINKADE, J., and RICHARDS, J., concur.

SPECIAL ASSESSMENTS FOR STREET IMPROVEMENTS.

Court of Appeals for Hamilton County.

KELLY V. CITY OF CINCINNATI ET AL.

Decided, May 17, 1915.

Assessment—Necessity for a Street Improvement Must be Declared by Council—Before a Special Assessment Can be Levied—Different Plans for Assessment Can Not be Commingled—Grading May be Paid for by Special Assessment.

1. When an improvement is to be made by a city for which a special assessment is to be levied, council must declare the necessity by resolution, which shall determine the nature of the improvement and the method of the assessment, and where this is not done the cost can not be assessed.
2. Grading is a proper subject for special assessment.
3. Special assessments can not be sustained in any instance in excess of special benefits.
4. An assessment by the front foot can not be made under the guise of the benefit plan. Whichever plan is adopted must be pursued in accordance with the statute, and the two plans can not be commingled.
5. The failure of property owners to file objections to special assessments under the provisions of Section 3848, General Code, does not prevent them from seeking relief under the provisions of Section 12075, General Code, where the provisions of the law relating to assessment in proportion to benefits have been clearly violated.

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Oliver S. Bryant, for plaintiff.

Walter M. Schoenle, City Solicitor, and *Frank K. Bowman*, Assistant City Solicitor, contra.

JONES (Oliver B.), J.

This cause was heard in this court on appeal from the court of insolvency. It is a proceeding brought by owners of lots and lands abutting on Isabella street, seeking to enjoin the collection of so much of an assessment as they deem illegal and excessive, levied on such lands by the city of Cincinnati for the improvement of Isabella street from Markbreit avenue to a point 610 feet south.

Isabella street is a highway in said city, extending from Markbreit avenue, almost at Madison road, southwardly about half a mile, and that portion between its southern terminus and a point 610 feet south of Markbreit avenue had been improved by paving the roadway and setting curbs and gutters, the cost of which improvement had been assessed against the abutting property. The part of Isabella street lying between Markbreit avenue and this point 610 feet south of it had not been improved prior to the improvement for which the assessment under consideration was levied, but the lots fronting on it had been built upon and it was traveled on the natural grade of the street by vehicles, except for a portion of about 200 feet at its north end just south of Markbreit avenue, which portion was about twenty feet lower than the portions of the street both south and north of it. This low portion could not be used for vehicles, and Markbreit avenue could only be reached over this low portion of the dedicated street by pedestrians by means of a wooden footbridge.

Preliminary to this improvement, no previous grade having been established, the city by ordinance of March 26, 1912, established the grade of Isabella street from Markbreit avenue to a point 610 feet south, the grade so fixed being that of the natural surface of that part south of the 200-foot portion. In the improvement of said street and as a part thereof this low portion was filled with an embankment 20 feet in height by about 200 feet in length, to bring it up to such established grade, the cost

of such fill being \$3,955.39. In making said improvement the city also constructed certain cement sidewalks, at a cost of \$46.08, said sidewalks not being provided for in the legislation had by the city council for the improvement.

Plaintiff, Barton H. Kelly, contends that these two items should be eliminated from the assessment to be charged against his property.

The power to levy special assessments on abutting or benefited property is conferred by statute, and this power can be exercised only in the manner provided by law. (Section 3812, General Code.) When an improvement is to be made for which a special assessment is to be levied, council must declare the necessity by resolution, which shall determine the nature of the improvement and the method of the assessment. (Sections 3814 and 3815, General Code.) It being conceded that the small item of cement sidewalk was not provided for in the legislation for this improvement, its cost can not be assessed.

The matter of grading, however, is not so easily disposed of. The evidence submitted is in an unsatisfactory state in respect to whether grading was or was not provided for in the improvement legislation. In both the amended petition and the amended answer, on which the case was tried, it is alleged that the resolution declaring the necessity for the improvement, and the ordinance to proceed with the improvement, were for an improvement "by paving the roadway with bituminous macadam, according to certain plans and specifications then on file and according to the grade set forth in said resolution." Whether grading specifically appeared as one of the items of said improvement is not shown by the production of a copy of the resolution, the ordinance to proceed with the improvement, or the specifications. It is, however, agreed, that in order to make the grade of said street comply with the grade so established, the city in improving Isabella street constructed said fill at the cost named. And from the assessment ordinance, a copy of which was introduced, it appears that the improvement was to be "by *grading*, paving the roadway with bituminous macadam, and constructing the necessary drains and inlets."

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It is contended with great ability, on behalf of plaintiff, that where in the improvement of a street it becomes necessary to radically change the natural contour of the ground in the street by grading, in order to present a proper smooth surface suitable to receive the paving, such grading is analogous to the acquirement of the land itself on which the street is built, and that its cost can not be charged against the owners of abutting property; that, while under the old doctrine laid down in *Cleveland v. Wick*, 18 Ohio St., 303, such an assessment could have been upheld for the cost of the land occupied by the street, the later law, as laid down in *C. & N. Ry. Co. v. Cincinnati*, 62 Ohio St., 465, which directly overrules *Cleveland v. Wick*, and in *Baker v. Norwood*, 172 U. S., 269, and *Dayton v. Bauman*, 66 Ohio St., 379, would forbid it. And it is argued that the same law would apply to forbid the assessment of the cost of necessary grading.

To this we can not agree. It is common knowledge that one of the most important elements of roadbuilding is the grading of the roadbed itself to a suitable and proper grade; by excavation, where the natural surface is too high, and by embankment, where it is too low. And in a locality like Cincinnati, where the natural land is more or less hilly, this item of grading is usually one of the important matters in the improvement of a street that has not been previously improved. It is recognized as such in the statute itself by which such special assessments are authorized, Section 3812, General Code, in which section it is distinctly named as one of the elements of such an improvement. It is generally an essential part of every surface improvement, for which a special assessment may be levied not to exceed the special benefits conferred, as laid down in *Dayton v. Bauman*, *supra*, 393. Grading has been distinctly held to be a proper subject for special assessment in numerous other cases, among which are *Longworth v. Cincinnati*, 34 Ohio St., 101, and *Jessing v. Columbus*, 1 C. C., 90, 1 C. D., 54 (affirmed, *sub nom.*, *Central Ohio Rd. Co. v. Columbus*, 22 W. L. B., 453).

Counsel for plaintiff relies upon *Thale v. Cincinnati*, Court, Index, February 4, 1902; *Fridman v. Norwood*, 1 C.C.(N.S.), 97 (affirmed, 70 Ohio St., 431); *Carlisle v. Cincinnati*, 8 C.C.

(N. S.), 46 (affirmed, 77 Ohio St., 637), and *Bartley v. Cincinnati*, 8 C. C., 226. An examination of these cases shows that in each of them the item of grading which it was held could not be assessed was one occasioned by the change of an established grade to which an improvement had been previously made, and came within the terms of Section 3838, General Code.

In the legislation for this improvement it was provided that 50 per cent. of its cost, and the cost of intersections, should be paid by the city, and the remainder should be assessed upon the abutting property in proportion to the benefits resulting to it from the improvement. This is the second method of assessment provided by Section 3812, General Code.

There is no question under the evidence but that the making of this improvement, opening the street to public travel by means of this fill out to Markbreit avenue, opened up a thoroughfare of general benefit to the public, and of particular benefit not only to the north 610 feet of Isabella street, but to the southern portion of that street as well, and to cross streets and the entire neighborhood. This is undoubtedly recognized by the city in paying more than one-half of the cost. Whether this was the fair proportion of the cost to be paid by the city, and whether the district to be specially assessed as being specially benefited should have been limited as it was, are matters to be determined by the city council, and its discretion can not be controlled by the courts in the absence of manifest abuse.

The power of the court can however be invoked under Section 12075, General Code, to enjoin the collection of illegal assessments, and special assessments can not be sustained in any instance in excess of special benefits. *Chamberlain v. Cleveland*, 34 Ohio St., 551; *Walsh v. Barron, Treas.*, 61 Ohio St., 15, and *Walsh v. Sinms, Treas.*, 65 Ohio St., 211.

In this case a consideration of the assessment as fixed by the ordinance to assess, confirming the report of the estimating board and the evidence as to values and special benefits, shows that the amounts assessed were not fixed as required by law in proportion to the special benefits, but that the lots abutting the fill on the east side were assessed on a basis of \$1.61 per front foot and

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those on the west side on a basis of \$1.04 per front foot, while all the remainder of the property was assessed at amounts that would be obtained by the uniform rate of \$4.50 per front foot.

From the evidence it is apparent to the court that the lots at the north end, abutting the fill, received as much and in fact greater benefit from the improvement than did the other property, and that the low amounts for the assessments were fixed with the idea that larger amounts might be uncollectible because of the limited value of the lots. The evidence also shows that the value of the deeper lots on the east side was greater than that of those on the west and the special benefit was correspondingly greater.

An assessment by the front foot can not be made under the guise of the benefit plan. Which ever plan is adopted must be pursued in accordance with the statute and the two plans can not be commingled. (*Kelly v. Cleveland*, 34 Ohio St., 468, and *Dick v. Toledo*, 11 C. C., 349.) See also, as to benefit assessments, *Cincinnati v. Batsche*, 52 Ohio St., 324; *Klein v. Cincinnati*, 7 C. C., 266, and *Frey v. Findlay, Id.*, 311, 319.

The property owners had an opportunity to object to this assessment under the provisions of Section 3848, General Code, and should have done so, when the amounts might have been properly equalized and adjusted under Sections 3849 and 3850, General Code. But their failure to file such objections does not prevent them from seeking relief under Section 12075, General Code where, as in this case, the provisions of the law relating to assessment in proportion to benefits have been so clearly violated. The amended petition does not ask for an injunction against the entire assessment as levied, but only for an injunction as to any excess over what might be found to be a legal charge. The validity of the entire assessment as made is, however, brought to the consideration of the court, and with an amendment of the pleadings might be set aside as entirely illegal, with an order permitting the city to levy a reassessment. This would involve delay and expense. The evidence shows, and plaintiff admits, that his property has been specially benefited. If the amount

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assessed had been distributed at a uniform rate on the entire frontage assessed, it would have amounted to a rate of about \$3.45 per front foot. In the opinion of the court each of plaintiff's lots has been specially benefited to that extent, and said assessment is a proper charge in the several amounts that may result from a calculation of the front feet of the respective lots by such rate, and to that extent will be sustained.

A decree may be taken enjoining the collection of any part of said assessments in excess of such amounts.

Judgment accordingly.

JONES (E. H.), J., and GORMAN, J., concur.

COMPENSATION TO INJURED EMPLOYEE.

Court of Appeals for Hamilton County.

THE OHIO TRACTION CO. v. WASHINGTON.

Decided, January 19, 1916.

*Workmen's Compensation—Receipt of Award from the State Fund—
Not a Bar to an Action Against a Joint Tort-Ffeasor, Other Than
the Employer.*

The receipt of money by an injured employee from the state liability board of awards by virtue of the workmen's compensation law is not a bar to an action for damages against a person other than the employer whose negligence contributed to the injury.

Kinkad & Rogers, for plaintiff in error.

Fulford, Shook, Wilby & Fricke, contra.

JONES (E. H.), J.

The receipt of money by an injured employee from the state liability board of awards by virtue of the workmen's compensation law is not a bar to an action for damages against a person other than the employer whose negligence contributed to the injury, there being no provision in said act making the remedy therein provided exclusive. The rule that settlement with one joint tort-feasor is a bar

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to recovery from the other has no application and can not be invoked in such a case.

The presence of the piece of timber in the court room was within the discretion of the trial judge, and, while the prominence given it during the trial may have been unusual, it was not error upon which a reviewing court could bottom a judgment of reversal.

We find no error in the proceedings in the superior court, and its judgment will be affirmed.

Judgment affirmed.

JONES (OLIVER B.), J., and GORMAN, J., concur.

BASTARDY PROCEEDINGS BY A MARRIED WOMAN.

Court of Appeals for Clark County.

STATE OF OHIO, EX REL MARY RODEN, v. EDWARD N. CREGAR.

Decided, January 5, 1918.

Bastardy—Not Maintainable Where the Child Was Born After the Marriage of the Mother—Section 12110.

Bastardy proceedings can not be maintained by a married woman, notwithstanding the child was begotten prior to her marriage by a man other than her husband.

T. J. McCormick, for plaintiff in error.

Stafford & Arthur, contra.

KUNKLE, J.

This is a proceeding in bastardy which was originally brought before a justice of the peace under Section 12110, General Code.

This section provides:

“When an unmarried woman, who has been delivered of or is pregnant with a bastard child, makes a complaint in writing, under oath, before a justice of the peace, charging a person with being the father of such child, he thereupon shall issue his warrant, directed to any sheriff or constable of the state, command-

ing him to pursue and arrest such accused person in any county therein, and bring him forthwith before such justice to answer such complaint.”

Without undertaking to quote in detail from the record, it is sufficient to say that the same discloses that the child in question was begotten September 26th, 1916; that Mary Roden, the complainant, was married February 12, 1917; that the child in question was born June 13, 1917; that the complainant was, at the time of the birth of the child, at the time the proceeding was instituted before the justice of the peace, and still is, a married woman, being the wife of a man other than defendant in error.

Can this proceeding, under such a state of facts, be maintained? We have carefully considered the briefs which have been filed by counsel. Without attempting to discuss the authorities so cited in detail, we are of opinion that under the reading of Section 12110, General Code, and under the Ohio decisions, such as 30 O. S., 627; 43 O. S., 478, etc., this action can not be maintained.

We are also of opinion that the case cited by counsel for plaintiff in error in the 65 Nebraska Reports, p. 608, is clearly distinguishable from the case at bar.

A consideration of the Ohio cases, in our opinion, requires a holding to the effect that the action can not be maintained.

The judgment of the lower court will therefore be affirmed.

ALLREAD, J., and FERNEDING, J., concur.

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**GOODS STORED IN RAILWAY WAREHOUSE INJURED
BY FLOOD.**

Court of Appeals for Hamilton County.

**THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD CO. v.
WUEST ET AL.**

Decided, December 28, 1915.

*Act of God—Negligence Commingled Therewith—Cotton Stored in a
Railway Warehouse—Damaged by the Waters of an Extraordinary
Flood—Whether Warehouseman Exercised Ordinary Care a Ques-
tion for the Jury.*

1. A warehouseman is liable for damage done by an unprecedented flood to goods stored in his warehouse where his own negligence commingling with the act of God as an active and co-operative element resulted in damage to the goods.
2. A negligent warehouseman can be excused for failure to exercise ordinary care only in cases where the superior force of the act of God would have produced the same damage whether the warehouseman had been negligent or not.

Harmon, Colston, Goldsmith & Hoadly, for plaintiff in error.
Frank J. Dorger and Robert S. Alcorn, contra.

JONES (E. H.), J.

This action was brought in the Superior Court of Cincinnati by the defendants in error, Mary and Adam Wuest, doing business as Adam Wuest, against the Baltimore & Ohio Southwestern Railroad Company, to recover damages sustained during the flood of March, 1913, by plaintiffs below on bales of cotton and linters stored at the storage warehouse of the railroad company at the southwest corner of Front and Mill streets in the city of Cincinnati.

The railroad company, as a part of its business, had three different warehouses in Cincinnati, where it did a storage business for the benefit of the public desiring such accommodations. One was a large five-story brick warehouse, extending from the

west side of Smith street westwardly to Mill street. In addition to this large warehouse for the storage of general merchandise, the railroad company had a one-story frame building on the southwest corner of Second and Mill streets, and one on the east side of Mill street. The plaintiffs had stored, at the time of the flood, 324 bales of cotton and linters all but a small portion of which were stored in what was known as the old Southern Railway building on the southwest corner of Mill and Second streets. A few of the bales were stored in what was called the Fruit House, on the opposite corner. The plaintiffs had been storing cotton in those warehouses for seven or eight years prior to the flood of March, 1913.

Defendant claimed that the damage to plaintiffs' cotton was due to the flood of March, 1913, and was the result of an act of God. The defendant further claimed that in the exercise of ordinary care, in view of all the circumstances and conditions, it did all that could be reasonably expected of it for the protection of the cotton, and that it is therefore not responsible for the damage sustained by plaintiffs on account of said flood.

The trial resulted in a verdict in favor of the plaintiffs below for \$3,631.50, and to reverse the judgment upon this verdict this proceeding in error is prosecuted. The last paragraph of the statement above made accurately states the respective claims of the parties in this case and tersely states the issue which the jury was called upon to decide, which issue is exclusively one of fact for the jury.

The judgment of the court below, based as it is upon the verdict of the jury, can not be disturbed by this reviewing court unless it is found that there was some prejudicial error either in the admission or rejection of evidence or in the charge of the court. Recognizing this situation, counsel for plaintiff in error rely for a reversal of this judgment upon alleged errors of the trial judge in the general charge and in the refusal to give certain special charges requested by them, together with the giving of certain special charges requested by plaintiffs below.

The examination of the bill of exceptions, with a view to ascertaining the action of the court in giving the law of the case

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to the jury, shows that counsel for plaintiff in error in their carefully prepared brief have made complaints of error which are not borne out by the bill of exceptions. For example, we quote from page 36 of said brief as follows:

“The essential and important fact in this case was that the damage to plaintiffs’ property was caused by ‘an act of God,’ to-wit, the flood in the Ohio River, and that being the case the defendant’s negligence, if there were any, which we deny and will discuss at a later stage of this brief, did not make the defendant liable for the damage to plaintiff’s property.”

Continuing, on page 37, counsel quote from the opinion of our Supreme Court, in *Assur v. City of Cincinnati et al*, 88 Ohio St., 181, at page 187, language which they construe as a finding of that court to the effect that the flood of 1913 throughout the state of Ohio was “an act of God,” and counsel then say, on page 37 of the brief:

“If this court does not know already that the flood of 1913 was ‘an act of God,’ certainly the decision of the Supreme Court that it was, is binding upon and will govern this court.”

One would think from reading this portion of the brief that there was some ground of complaint against the charge upon this subject, but upon examination of the charge we find that the court, upon page 383 of the bill of exceptions, used this language in its charge to the jury:

“The flood of March, 1913, in some of its aspects may properly be considered by you as such an act of God.”

From a reading of the entire brief, however, it fairly appears that the thing complained of by counsel in this connection is that the court refused to charge that the damage to the cotton was an “act of God.” Such a charge would have been erroneous under the evidence in this case, pages of the record being devoted to testimony adduced by plaintiffs tending to show that notwithstanding the unusual and almost unprecedented flood in the Ohio river, the railroad company, as the custodian of these goods, had ample time and opportunity to protect them

from the ravages of the flood and to remove them to a place of safety. It was shown that after warnings had been received through the weather bureau, and other sources, of an unexpected rise in the Ohio river, 409 tons of freight had been received and stored by the company through its regular employes in the large warehouse near by. The purpose of this and other evidence was to place fully before the jury the facts and conditions existing, in order that it might be determined whether or not the claim of the railroad company, that it did all that could reasonably be expected of it for the protection of the cotton, in view of all the circumstances and conditions, was true. All this evidence so offered was relevant and material under the law, as well stated in the case of *Backus & Sons v. Start et al*, 13 Fed. Rep., 69, the syllabus of which reads:

"3. Warehousemen are not required to provide against an unprecedented emergency; but if they have reason to expect such an emergency, they are bound to take such precautionary measures to prevent loss as prudent and skillful men in the like business and under like circumstances might be expected to use.

"4. They are not bound to have or keep on hand special facilities to meet and overcome possible but unexpected and unprecedented emergencies, which are included in what is called the 'act of God'; but if imminent danger presents itself, to use such appliances and means as the ordinary and safe conduct of their business requires them to possess, and such as are at hand, and to use them with such promptness as would be expected of ordinarily careful and prudent men in regard to their own, or property entrusted to their care under like circumstances."

Section 8459, General Code, thus defines in part the duties of a warehouseman:

"A warehouseman may insert in a receipt, issued by him, any other terms and conditions, provided that such terms and conditions shall not:

"1. Be contrary to the provisions of this chapter.

"2. In any wise impair his obligation to exercise that degree of care in the safekeeping of the goods entrusted to him which a reasonably careful man would exercise in regard to similar goods of his own."

And in *H. A. Johnson & Co. v. Springfield Ice & Refrigerating Co.*, 143 Mo. App., 441, it is held:

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"A warehouseman can not escape liability for damage from an unprecedented flood to goods stored in his warehouse where it appears that his own negligence, commingling with the act of God as an active and co-operative element, resulted in damages to the goods. The warehouseman would be excused for failure to exercise ordinary care only in cases where the superior force of the act of God would have produced the same damage whether the warehouseman had been negligent or not."

From *Memphis & Charleston Rd. Co. v. Reeves*, 10 Wall., 176, 179, we quote the following language from the charge of the trial court in that case, which was held by the reviewing court to be a correct charge:

"When the damage is shown to have resulted from the immediate act of God, such as a sudden and extraordinary flood, the carrier would be exempt from liability, unless the plaintiff shall prove that the defendant was guilty of some negligence in not providing for the safety of the goods. That he could do so must be proven by the plaintiff, or must appear in the facts of the case."

These excerpts correctly state what we conceive to be the law applicable to this case. We now quote from the charge of the trial court in the instant case, at pages 383-4-5 of the bill of exceptions:

"An extraordinary flood of such volume and height and coming with such rapidity as to be almost if not quite unprecedented, is sometimes referred to as an act of God. By this term is meant an occurrence directly and entirely due to natural causes operating without human intervention and such that because of its magnitude or the suddenness of its coming, it could not have been foreseen in the light of ordinary knowledge.

"The flood of March, 1913, in some of its aspects may properly be considered by you as such an act of God.

"The question, however, in this case remains for your determination, whether the defendant under the circumstances existing for the period shortly prior to the stage of flood which reached plaintiffs' goods, and with the knowledge of conditions, which defendant had or should have had at that time, exercised ordinary care for these goods stored in the so-called fruit house and old southern depot warehouses.

"If the defendant had or should have had knowledge of, or reasonable ground to anticipate a stage of water in excess of sixty-two feet, at about which height plaintiffs' cotton was originally stored, and after such knowledge was had or should have been had, failed to use facilities reasonably available and such as would have been employed by ordinary prudence to protect the cotton from such stage of flood as was reasonably to have been anticipated, then defendant was negligent. Defendant, however, was not bound to keep on hand and immediately available facilities to meet an emergency not reasonably to have been anticipated, but only to take such precautionary measures to prevent loss as prudent and skillful men in a like business and under like circumstances would ordinarily take.

"The standard of ordinary care is in law an unvarying standard, but manifestly that action or inaction which will amount to ordinary care depends on the facts and circumstances of each particular case. Ordinary care is a course of ordinary prudence, commensurate with the danger reasonably to be anticipated.

"Accordingly, if you should find that at the time in question the defendant was wanting in the duty of care incumbent upon it with respect to plaintiff's goods, the defendant would not be excused by the mere fact of the occurrence at that time of an act of God, manifested in the flood. In such event you must determine further whether such negligence on the part of the defendant if the defendant was negligent, or such act of God or other cause was the operative or proximate cause of the damage. If defendant was negligent and such negligence operated proximately and directly to cause damage to plaintiff's cotton, the defendant is responsible for such damage.

"If, however, you should find that the flood in the extent, rate of increase and height was such as was not reasonably to have been anticipated by defendant in time to provide against damage to plaintiffs' goods by measures of ordinary prudence in view of facilities reasonably accessible, and if as the flood increased the defendant took such precautions as were called for by ordinary prudence, then the damage which actually resulted is chargeable to what has been termed an act of God and not to negligence on the part of defendant and defendant can not be held to answer therefor."

This, we think, is a clear and complete statement of the law considered both as an abstract proposition and as touching the issues in this case.

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There were a great many special charges requested by each of the parties in the trial below, and most of the argument of counsel for plaintiff in error, both orally and by brief, was addressed to alleged errors of the court in ruling upon these special requests. We have found that the rulings of the learned judge upon each and all of these requests were consistent with the correct view of the law entertained by him and as expressed to the jury in the portion of the general charge above set out.

As before stated, it was the contention of counsel for plaintiff in error, both in this court and in the court below, that under the evidence in this case a verdict should have been instructed for the defendant at the close of all the evidence, on the theory that the flood in the Ohio river in the year 1913, which caused this damage, was an "act of God." We have already made clear our views that such an act on the part of the trial court would have been erroneous and wholly unjustified by the facts in this case. Cases are cited in which it has been held by eminent authorities that the evidence not only justified but required such action by the trial court. Other actions for damages by flood have been cited where the judgments of the *nisi prius* courts have been reversed for the refusal of the trial judge to charge that the damage caused by the flood was an "act of God." Some of these cases grew out of the great flood at Kansas City on May 31, 1903. The damage at that time and place was caused by joint floods in the Missouri and Kaw rivers, which unite at or near Kansas City. The weather reports predicted the rise in the Missouri river, but the rise in the Kaw river was not only wholly unexpected but was unprecedented. The weather bureau had received no advices as to the water in the Kaw river. There was nothing in the telegraphic reports to indicate an unprecedented volume of water in the Missouri river.

In *Wertheimer, Swartz Shoe Co. v. Missouri Pac. Ry. Co.*, 147 Mo. App., 489, 126 S. W. Rep., 793, which is one of these flood cases, the court in its opinion, describing this flood, says at page 494:

"This rise had been gradual for several days and was due to heavy rains over the States of Missouri and Kansas having

swollen the Missouri and Kansas rivers. But similar overflows had occurred before in the river bottom at Kansas City without damaging property, and similar warnings had been given by the weather office. On May 31st an overwhelming flood occurred there in consequence of a vast volume of water pouring from the Kaw river in a torrent strong enough to turn back the current of the Missouri river and cause that stream to flow for a few miles towards its source. This flood was unexpected even by the official in charge of the government weather office in Kansas City, as he testified. The witness said he had sent out bulletins and warnings to railroad companies and others from day to day as the waters rose, giving notice of danger, but the flood stage of thirty-five feet was unexpected."

The court held in that case "that the loss was due to the flood, and not to the railroad's failure to remove the goods to a place of safety."

Another case cited, where it was held as a matter of law that the flood damage was caused by an "act of God," was *Herritt Creamery Co. v. Atchison, T. & S. F. Ry. Co.*, 139 Mo. App., 149, 122 S. W. Rep., 322. This action arose out of the same Kansas City flood, and the court found that the flood on May 30 and 31, 1903, at the junction of the Kaw and Missouri rivers, Kansas City, Missouri, was an "act of God," and that a carrier was not liable for loss of freight by such flood. And in its opinion the court said, at page 152:

"Plaintiff's entire case turns on a mere question of fact: that is, did defendant know or could it have known of the coming flood? * * * The Kaw suddenly rose, at Topeka and above, —miles from Kansas City, in addition to its already overflowed banks, and much stress is put upon the knowledge which defendant's officers had obtained by telegraph of the coming of these waters. But it was shown that the amount of rise which these additional waters would have caused at Kansas City would have left plaintiff's butter unharmed in the position in which defendant had placed it. The cause of the great destruction and the overwhelming nature of the flood arose, in great part, from the unexpected volume of water added to the already flooded Missouri. The result of the floods of both rivers joining at Kansas City caused the great destruction of property which that catastrophe brought about in such short time that few escaped its fury."

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We cite only these two cases to show that where courts have decided as a matter of law that flood damage was an "act of God," the uncontroverted facts would admit of no other conclusion.

Such is not true in this case, the facts of which differ very materially from those just narrated from the Kansas City case. This flood was neither unprecedented nor unexpected. The evidence does show, we think, that some two or three days after the first warnings were received by the railroad company and others the rise was very rapid—unexpectedly so—but the evidence also shows that during all this time the railroad company, the warehouseman, in this case, was anticipating danger to the storage-shed and its contents and was directing its efforts along the line of preparing for the expected flood, although what was done did not inure in any way to the benefit of Mr. Wuest in saving his cotton. The case presented to us is not similar in a legal aspect to the cases growing out of the Kansas City flood.

The flood which reached this cotton and linters and caused this damage was neither unexpected nor unprecedented. The damage was caused many hours after repeated warnings had been given by the bureau and had been brought to the knowledge of the railroad company. Such being the case, the question as to whether the railroad company, in the exercise of ordinary care, did all that could be reasonably expected of it for the protection of the cotton, was one for the jury. This question was submitted to the jury under a clear and correct charge by the court.

Finding no errors in the proceedings of the court below, its judgment will be affirmed.

Judgment affirmed.

JONES (Oliver B.), J., and GORMAN, J., concur.

**CONTRACTS UNDER WHICH THE BALLEE BECOMES
AN INSURER.**

Court of Appeals for Ashtabula County.

THE TRIANGLE FILM CORPORATION V. HELEN SAKS.

Decided, December 2, 1917.

Contracts of Bailment—Where there is an Agreement to Pay for Goods Lost or Destroyed—Cause of Action Stated Without Averring Negligence, When.

Where in an action on a contract of bailment which provides, "That persons * * * taking the service specified in the order shall pay for any property * * * lost, destroyed, or damaged, general wear and tear excepted," the petition avers that the article bailed was destroyed by fire while in the possession of and under the control of the bailee, such petition states a cause of action without averring any negligence on the bailee's part.

Squire, Sanders & Dempsey, for plaintiff in error.

METCALFE, J.

A demurrer was sustained to the plaintiff's petition in the common pleas court, and the correctness of that ruling is the only question that we have here.

The petition recites that the plaintiff is a corporation engaged in the business of furnishing moving picture films to various theaters; that the plaintiff and defendant, Helen Saks, entered into a contract by the terms of which the plaintiff agreed to furnish the defendant, for use in her theater called the Strand in the city of Conneaut, Ohio, nine hundred linear feet of films each week; that the contract was in writing and contained the following provision, "That persons, co-partnerships, or corporations taking the film service specified in the order shall pay for any property of Triangle Film Corporation lost, destroyed, or damaged, natural wear and tear excepted, at the rate of \$.20 per linear foot for all films." On the 14th day of March, 1916, a quantity of films which plaintiff furnished to defendant were

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destroyed by fire while in the defendant's possession and control. No negligence on the part of the defendant is averred in the petition.

Defendant in error contends that the furnishing of the films by the plaintiff to the defendant for hire the defendant can only be held liable for any loss or damage which occurred through their negligence. We do not think there is any question but that the contract stated in the petition is a contract of bailment, but such a contract is governed by its specific terms just the same as any other contract.

The provision of the contract in question is not a contract to return goods, natural wear and tear excepted, but is a contract to pay for them if lost, or destroyed, except by natural wear and tear. It makes no other exception. Under it the bailee became the insurer of the property, if lost or destroyed while in her possession or under her control, and the burden would be upon her to prove any circumstances which might relieve her from that liability, if any such exists.

This provision of the contract is too plain to be construed in any other way. The law upon this subject is very clearly stated in the 3d R. C. L., page 105, Section 30:

"While in the absence of a special agreement the law of bailments outlines definitely the degree of responsibility imposed on a bailee for the care of the thing bailed, this does not prevent the parties from making their own contract in reference to their mutual rights and liabilities under bailments of property as well as in reference to other subjects, and generally speaking it seems that they may, by express contract, enlarge, abridge, qualify, or supercede the obligation which otherwise would arise from the bailment by implication of law. Thus, where a bailee enters into a special contract to return the property in good condition, or to pay its value, he is an insurer, and if loss occurs while it is in his possession, he is liable for its value."

Grady v. Schwinler, 16 N. D., 452 (14 L. R. A. [N.S.], 1089); *Sleevers v. Gable*, 94 Iowa, 75 (27 L. R. A., 733); *Meeks v. Cold Storage Co.*, 107 La., 172 (57 L. R. A., 271); *Geisweiler v. Railway Co.*, 82 Mo., 112 (53 Am. Rep., 558); *Canfield v. Railway*

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Co., 92 N. Y., 532; *Johnson v. Miller*, 96 N. Y., 93; *Browning v. Hanford*, 5th Hill (N. Y.), 588 (40 Am. Dec., 369).

The rights of the parties are to be determined by the express provisions of the contract and not by the common law.

The judgment is reversed.

POLLOCK, J.. and FARR, J., concur.

AS TO RELIEF FROM ALLEGED UNJUST TAXATION VALUES.

Court of Appeals for Hamilton County.

HELMERS ET AL, PARTNERS, V. MCCARTHY ET AL, BOARD OF
DISTRICT ASSESSORS, ET AL.

Decided, January 29, 1917.

Taxation—Relief from Alleged Unjust Appraisements—Must First be Sought from the Board of Complaints—Aid of a Court of Equity Available Only, When—Notice by Publication of Completion of Work by the Taxing Authorities.

1. A party seeking relief from an alleged illegal and unjust taxation value must first exhaust all his legal remedies before resorting to a court of equity; and where the law provides the tribunal to which he can appeal for relief, such as a board of complaints, state tax commission or board of revision, he must avail himself of such opportunity before he can be heard in a court of equity.
2. Publication in a newspaper, as provided by law, of the fact that the taxing authorities had finished their work and that the same was open for inspection and objection is sufficient to charge a tax-payer with notice of the action of the assessors.
3. The fact that a board of complaints had more work than it could and did perform does not relieve a tax-payer from the duty of first filing complaint with such board.
4. Before one can be entitled to invoke the aid of a court of equity by the extraordinary remedy of injunction, something more than an irregularity, or illegality in procedure, or arbitrary official action, must be shown. There must be a wrong, an injustice or an irreparable injury for which the law provides no adequate remedy; otherwise no relief can be granted.

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Otto Pfleger and Renner & Renner, for plaintiffs.
Campbell, Hickenlooper, Hauck & Capelle, contra.

JONES (E. H.), J.

After a careful consideration we have reached the conclusion that the principles of law announced in the case of *Mills, Trustee, v. Bd. of Equalization of Cincinnati*, 1 C. S. C. R., 566, and in the case of *Wheeling Electric Co. v. Tax Commission of Ohio*, decided by Judge Sater of the United States District Court for the Southern District of Ohio, are controlling in this case. The opinion in the latter case has not yet been reported, so far as we know, but a copy of same is attached to the brief filed by counsel for defendants herein.

In the cases above cited it was held that a party seeking relief from an alleged illegal and unjust taxation value must first exhaust all his legal remedies before resorting to a court of equity; and that where the law provides the tribunal to which he can appeal for relief, such as a board of complaints, state tax commission or board of revision, he must avail himself of such opportunity before he can be heard in a court of equity.

It is admitted in this case that no appeal from the alleged unjust increase in their tax valuation was taken by the plaintiffs to the board of complaints. As an excuse for this they say: first, that they had no notice of the increase until they received their tax bill, which was some time after the board of complaints had finished its work and adjourned; and, second, that if they had made a complaint or filed an appeal with the board of complaints it would not have been heard for the reason that the said board adjourned with a great many complaints on file untried and undisposed of. Neither of these excuses is valid. The firm had the only notice which the law provides for, namely, the publication in a newspaper of the fact that the tax commission had finished its work and that the same was open for inspection and objection. The evidence shows that these notices were published in accordance with the law and it follows that the plaintiffs had constructive notice of the action of the assessors. In the second place, the fact that the board of complaints had more work than it could and did per-

form does not relieve the plaintiffs from the duty of first filing their complaint with it. Had they done so, and a hearing for any reason had been denied them, it might well be claimed that they would have some standing in this court.

On the authorities above cited, which are only reaffirmations of the well-established general rule that a resort to a court of equity can only be had where there is no adequate remedy at law, we hold that the plaintiffs' petition should be dismissed and the relief therein prayed for be denied.

We are constrained to add that regardless of the above barrier, technical as it may appear, the plaintiffs would not be entitled to the relief sought even though their petition were entertained. The employee who made the tax return did not appear as a witness in the case. The chief witness for the plaintiffs upon the question of values was a member of the firm, who testified that the machines, the value of which was the subject of this action, were carried upon their books at a value of three times that at which they were returned by them for taxation. In the light of this and other evidence in the case, we are satisfied that the value fixed on these machines by the district assessors was fair and reasonable; and therefore the plaintiffs must be considered as coming for relief to a court of equity while themselves unwilling to do equity by contributing their fair proportion of taxes to the public treasury.

Under this evidence, there being no wrong to make right, there would be no room for the intervention of a court of equity.

"It by no means follows, however, that the plaintiffs are entitled to an unconditional injunction against the collection of the tax. They ask equity, and must do equity. They invoke the exercise of an extraordinary power of the court for their relief, and the court in its discretion should refuse that relief, except upon conditions that are equitable and just. We think, therefore, that the injunction should only be granted upon the condition that the plaintiffs, or their bank, shall first pay to the treasurer of Hamilton county, a sum that will be a *pro rata* equivalent for the tax imposed upon the state and independent banks, under the act of 1861—that is to say, such sum as might lawfully have been assessed upon the plaintiffs, or their bank, under said act, had it been one of said state

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banks. If the parties can not agree upon this sum, proceedings can be adopted to ascertain it by the court; and, if found necessary, the bank itself can be made a party." *Frazer et al v. Sieborn, Auditor et al*, 16 Ohio St., 614, at page 624.

Courts of equity look through the form into the substance of things. Before one can be entitled to invoke their aid by the extraordinary remedy of injunction, something more than an irregularity, or illegality in procedure, or arbitrary official action, must be shown. There must be a wrong, an injustice or an irreparable injury for which the law provides no adequate remedy; otherwise no relief can be granted.

The petition of plaintiffs will be dismissed at their costs.

JONES (OLIVER B.), J., and GORMAN, J., concur.

LIS PENDENS AGAINST PROPERTY IN SUIT FOR ALIMONY.

Court of Appeals for Hamilton County.

THE ELMWOOD PLACE LOAN & BUILDING CO. V. THE CINCINNATI
CONCRETE CO. ET AL.

Decided, March 22, 1915.

*Lis Pendens—Under a Restraining Order in Action for Alimony—
Property Covered Affected from Date of Filing of the Petition and
a Judgment Relates Back.*

When a petition for alimony is filed and a restraining order issued enjoining the defendant from disposing of or incumbering certain property described in the petition, the action in alimony becomes a *lis pendens* against the property described in the petition and covered by the injunction, from the date of the filing of such petition and the issue of such injunction, and a judgment thereafter taken in the suit for alimony relates back to the date when the petition was filed and the restraining order issued.

W. W. Bellew, for Luella J. Brown.

Philip & S. C. Roettinger and Harry B. Street, contra.

JONES (Oliver B.), J.

The question to be determined in this case is one of priority of liens upon a fund arising from the sale of certain real estate under foreclosure proceedings.

Luella J. Brown claims a lien by virtue of a decree for alimony. The petition under which said decree was taken was filed November 8, 1911, and a restraining order was issued on that date enjoining the defendant from disposing of or encumbering property, the description of which was set out in the petition, and which included a lot later sold in foreclosure, the proceeds of which are now sought to be reached. This injunction remained against said property until the entry of the decree, which was made October 24, 1912, and which adjudged in addition to other property an allowance of the sum of \$900 in money, which was thereby made a lien on said real estate.

The Cincinnati Concrete Company claims a lien for \$299.89 by reason of a judgment taken against Jay Brown, the owner of said real estate, before Edward F. Woodruff, justice of the peace, a transcript of which judgment was filed in the court of common pleas May 4, 1912. The transcript shows that this judgment was taken before the magistrate March 12, 1912, upon the confession of the defendant. This confessed judgment was therefore a violation of the restraining order issued against said defendant in the alimony case. Outside of that question, however, the action in alimony became a *lis pendens* against the property described in the petition and covered by the injunction, from the date of the filing of said petition and the issue of such injunction, and the judgment when taken in that case related back to that date, November 8, 1911.

Luella J. Brown must therefore be held to have a prior lien on the proceeds of said property. *Tollerton et al, Exrs., v. Williard et al*, 30 Ohio St., 579.

Judgment accordingly.

JONES (E. H.), J., and GORMAN, J., concur.

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**AS TO WHETHER OPTION OF RENEWAL WAS EXERCISED
BY LESSEE.**

Court of Appeals for Butler County.

HARLAN V. VEIDT.

Decided, April 12, 1915.

Landlord and Tenant—Notice of Election to Have Term of Lease Extended Not Necessary, Unless—Tenant at Sufferance Has no Term—Only One in Possession May Maintain an Action to Quiet Title—Such an Issue Can be Determined Only in a Court of Law—Jurisdiction of Courts of Equity.

1. When a lease contains an option to the lessee to have the term of the lease extended, no notice of an election to have the term continued is necessary, unless it is required by the terms of the lease.
2. The jurisdiction of a court of equity can not be invoked when the plaintiff has a plain, adequate remedy at law.
3. A tenant at sufferance has no term, but is in merely by the forbearance of the landlord to act.
4. Only one who is in possession of real estate may maintain an action to quiet title, unless the plaintiff claims as remainderman or reversioner.
5. The question of title can not be raised in an injunction case, and is one to be determined in a court of law.

B. F. Harwitz and Allen Andrews, for plaintiff.
Edgar S. Belden and W. K. Rhonemus, contra.

GORMAN, J.

This cause comes into this court on appeal from a judgment of the common pleas court.

The plaintiff, Mary A. Harlan, avers in her petition that she is the owner in fee simple of a certain described farm in Madison township; that defendant, Edward Veidt, entered upon said premises as the tenant of plaintiff's grantor; that said defendant's term of rental expired March 1, 1914, but by sufferance of the parties he was permitted to remain in possession until

March 1, 1915; that without plaintiff's knowledge or consent defendant has plowed certain fields in said farm and is about to and threatens to sow the same in rye, and claims to be entitled to retain possession of said premises after March 1, 1915; and that defendant claims to be entitled to other interests in said lands and to the possession thereof, all of which claims of possession and of right to enter upon and plow the fields of said lands after March 1, 1915, are a cloud on plaintiff's title. The prayer of the petition is that defendant be enjoined from plowing any of the fields and from sowing the same in crops; that defendant be required to show his title to said real estate; that the court adjudge his claims to be null and void and a cloud on plaintiff's title; that plaintiff's title be quieted as against the defendant's claims; that he be perpetually enjoined from entering upon any portion of said premises and perpetually enjoined from setting up any claim or title adverse to plaintiff's title to said premises; and for all other relief.

In his answer defendant admits plaintiff's title in fee simple; admits that he is about to plow and threatens to plow and sow as alleged in the petition; admits that he claims to be entitled to retain possession of the premises after March 1, 1915; and denies each and every other allegation of the petition. Defendant further sets up that he entered into the possession of said premises on March 1, 1911, under a lease for three years from S. Jennie Sorg, who is plaintiff's grantor and was the owner in fee simple of said premises, and attaches to and makes a part of his answer a copy of said lease; that the term of said lease expired March 1, 1914; that it contained a privilege or option on his part of two additional years on the expiration of the lease; and avers that he is in possession under said lease and entitled to hold, keep and control the same until March 1, 1916, by virtue of the terms of said lease. He denies that his possession during 1914 was by sufferance, and avers that he has kept and observed all the covenants and stipulations of said lease on his part to be performed; and he prays that plaintiff's petition be dismissed.

The reply denies that defendant exercised his option or privilege of two additional years, avers that he failed to exercise his

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privilege for two additional years, and pleads that defendant is estopped to claim his right of occupancy and possession for said additional term of two years.

The copy of the lease, and the original lease, which were offered in evidence, contain these provisions as to the term of the lease:

“For and during the full term of three years next ensuing, commencing on the first day of March, 1911, and to be fully completed and ended on the 28th day of February, 1914; with the privilege of two additional years at the expiration of this lease.”

And it contains the following covenant as to the rent for the additional term of two years:

“It is further agreed by and between the parties that said lessee shall have the right, privilege and option of an additional term of two years from and after the expiration of the term hereby created; upon the condition, however, that the rent for any additional term after the expiration of the three years herein granted, shall be the sum of \$800 for each and every year; the rent to be payable in advance as hereinbefore stated.”

It appeared in evidence that defendant entered into possession under said lease and has remained in continuous and uninterrupted possession ever since; that on March 2, 1914, S. Jennie Sorg conveyed by warranty deed to plaintiff said premises, which deed was recorded March 3, 1914. In said deed was the following stipulation with reference to defendant's lease: “And further subject to a lease on said premises granted by S. Jennie Sorg to Edward Veidt, to which lease reference is hereby made.” Plaintiff therefore bought said premises with full knowledge of and subject to said lease, which was in writing and duly witnessed and acknowledged.

The transcript of the evidence on which the case is here submitted discloses that the lease and deed were offered in evidence; that plaintiff had a contract to purchase the premises, made in October, 1913, but not closed up until March 2d or 3d, 1914; and that some time in the early part of December, 1913, Dr. Harlan, the husband and agent of plaintiff, met Veidt, the defendant, in Middletown and had a conversation with him about the farm.

He told Veidt that he had bought the farm. Veidt complained of the high rent and the need of repairs, and said that he did not intend to pay that \$800 "until a h—— of a lot of fixing was done." Veidt said nothing about leaving the farm or surrendering it at the expiration of the term, March 1, 1914. That was the only conversation between Veidt and Dr. Harlan until March 5th or 6th, 1914, on which date Mr. Walburg, the agent for Mrs. Sorg, and Dr. Harlan called on Veidt, who was still in possession of the farm, and talked to him about the payment of the \$800 rent for 1914. Veidt did not pay them the rent, but complained a great deal about the need of repairs and the high rent. Walburg asked Veidt if he intended to avail himself of his option under the lease, and Walburg said: "If you do, I am here to collect the rent, which is now past due." Veidt, according to Dr. Harlan, made no positive answer as to whether he would exercise his option or not. Mr. Walburg testified that, when asked if he wanted to exercise his option under the lease (for two years), Veidt said he did not know whether he would or not; and then complained of the high rent and the lack of repairs. Veidt did not then pay the \$800 rent although several times asked to do so by Walburg. Veidt continued to remain on the farm, and on June 12, 1914, he paid Walburg, agent for Mrs. Sorg, \$800, the rent for 1914, and stated in a note left for Walburg that he would be ready with the \$800 rent on March 1, 1915, for the second year. Walburg saw plaintiff and her husband, Dr. Harlan, and they kept the \$800, and Walburg then wrote a note to Veidt on June 15 (Exhibit 4), in which he states that he has gotten Dr. Harlan's consent to accept the check for \$800, and that Dr. Harlan has consented not to disturb Veidt during the growing season of 1914. Up to the time of paying the \$800 rent, June 12, 1914, Veidt did not inform Walburg or Dr. Harlan that he intended to remain the two years longer provided for in the lease; but he remained on the farm after March 1, 1914, and it is in evidence that he denied ever intimating that he intended to surrender the farm before March 1, 1916.

Without undertaking to review the evidence fully, it appears to be sufficiently disclosed that Veidt did not vacate or surrender

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before March 1, 1914; that he never said he would do so; and that he continued in possession after March 1, 1914, in pursuance of his right or privilege for two additional years, according to his statement. He was in under the lease, and in our opinion the mere holding over after March 1, 1914, was an exercise of his option or privilege to remain for the two additional years. It was not necessary for him to indicate, otherwise than by continuing in possession, after March 1, 1914, that he made his election to remain for the additional term of two years. The holding over without any new agreement was an election on his part, and he was bound for the two years and liable to plaintiff for the two years' rent at \$800 per year as stipulated in the lease. We consider this provision in the lease as an agreement for an *extension* of the lease and not for a renewal. If it had been a provision for a renewal, then notice on Veidt's part would be necessary in order to entitle him to *remain longer*. (Jones on Landlord and Tenant, Section 339.) But there is a distinction made in the cases between a renewal of a lease and an extension, and in the case of the lease before us, no notice is required to entitle the tenant to the additional term. Merely holding over under the lease constitutes an election to exercise the privilege or option. Jones on Landlord and Tenant, Section 337; *Fleischner v. Citizens' Inv. Co.*, 25 Or., 119, and *Harding v. Seeley*, 148 Pa. St., 20.

When there is an option to the lessee to have the same term extended, no notice of an election to have the term continue is necessary, unless it is required by a clause in a lease. Jones on Landlord and Tenant, Section 340; *Terstegge v. First German, etc., Society*, 92 Ind., 82; *Montgomery v. Board of Commissioners*, 76 Ind., 362; *Mershon v. Williams*, 62 N. J. L., 779; *Chandler v. McGinning*, 8 Kans. App., 421, and 18 Am. & Eng. Ency. of Law (2d Ed.), 693.

The case cited by counsel for plaintiff, *Keppler Bros. v. Heinrichsdorf*, 5 C.C.(N.S.), 112, which holds that notice was necessary, was a case in which the lease stipulated for a notice to be given by the tenant of his intention to accept or decline, six months before the termination of the lease.

We are therefore of the opinion that the defendant, being liable for the two years additional rent under the extension of the lease, was entitled to remain on the farm and plow and sow, and the petition of plaintiff should be dismissed.

But whether this conclusion be sound or otherwise, we are further of the opinion that the plaintiff is not entitled to invoke the jurisdiction of a court of equity, as she has done in this case, when she has a plain, adequate remedy at law. Possession of this farm after March 1, 1915, is what the plaintiff sought. The plowing of the fields was not in the nature of waste, nor is it claimed that any substantial injury was being done to the freehold so as to entitle plaintiff to an injunction to prevent the commission of waste. Plaintiff could have brought an action in forcible entry and detainer, if, as she averred, the defendant was a tenant at sufferance, because if this claim were true then defendant was holding over his term and not a tenant at all, and forcible entry would lie. There would be no question of title involved, as a tenant holding over would not be permitted to question his landlord's title. A tenant at sufferance has no term, but is in merely by the forbearance of the landlord to act, his omission to take action to evict the tenant. A tenancy by sufferance is not a tenancy at all. It is a mere holding by laches of the owner. Jones on Landlord and Tenant, Sections 220-221.

But it is averred that the defendant claims some title adverse to plaintiff's title and is in possession. The evidence does not disclose this to be true; but, if it were true, then the plaintiff's remedy would be an action at law in ejectment to recover the lands, under Section 11903, General Code, in which action all questions of plaintiff's and defendant's titles, legal or equitable, could be raised.

Nor can it be claimed that plaintiff can maintain this action as one in equity to quiet title, because she is not in possession of the lands, and it is only those who are in possession of the real estate who may maintain an action to quiet title, unless the plaintiff claims as remainder-man or reversioner, which plaintiff in this action does not aver. See Section 11901, General Code; *Elkithorpe v. Buck et al*, 17 Ohio St., 72, 75, and *Bailey v. Hughes*, 35 Ohio St., 597.

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Nor can the question of title be raised in an injunction proceeding. The question of title is one to be determined exclusively in a court of law.

“A bill to establish a legal title and to restrain proceedings at law will not be entertained, no equitable circumstances appearing in the case and nothing that prevents a full defense at law.” 1 High on Injunctions (4th Ed.), Section 101, and *De Groot et al v. Receivers*, 2 Green Ch., 198.

Injunctions in cases affecting the possession of real estate would not be countenanced by the court of equity; and this has been the rule from the earliest times. 1 High on Injunctions (4th Ed.), Section 344, and *Lady Poines's Case*, 1 Vern., 156.

If one is in possession without legal title, the remedy is at law and not by injunction. 1 High on Injunctions (4th Ed.), Sections 359, 360; *Pfeltz et al v. Pfeltz et al*, 14 Md., 376, and *Toledo Exposition Co. v. Kerr et al*, 8 C.C.(N.S.), 369.

The averments of the petition in the case at bar, as in the case we next cite, disclose an action for the recovery of real property, ejectment, and the facts set out in the case cited are so similar to the averments of the petition in the case at bar that we might well decide this case on that authority. *Raymond v. T., St. L. & K. C. Ry. Co.*, 57 Ohio St., 271, proposition 4 of the syllabus.

On the ground that plaintiff is not entitled to a decree under the facts of the case, and because this court as a court of equity has no jurisdiction, this being a case at law, the plaintiff's petition must be dismissed at her costs.

Petition dismissed.

JONES (Oliver B.), J., concurs.

JONES (E. H.), J., dissenting.

I can not agree with my associates as to the nature of this action as disclosed by the pleadings, nor upon the conclusions to be drawn from the evidence as to the right of possession since March 1st, last.

Plaintiff alleges that defendant is plowing the fields and sowing rye, and her first prayer is that he be enjoined from so doing, for the reason that his right of possession will terminate on March 1, 1915, and that he is planting a crop that will not mature by that time. This prayer is further predicated upon allegations the substance of which is that such conduct on the part of defendant is equivalent to a threat to interfere with or totally deprive plaintiff of her possession after March 1, 1915, when, she avers, such right will accrue to her.

At the time plaintiff began this action below, she had no right of possession and claimed none. So that the fourth paragraph of the syllabus in *Raymond v. T., St. L. & K. C. Ry. Co.*, 57 Ohio St., 271, so strongly relied upon in the foregoing opinion, has no application to this case. There the plaintiff had the right to possession, as stated in the syllabus. Basing its judgment on that fact, the court there held that plaintiff had a remedy at law. What remedy at law had this plaintiff when her action was commenced? None whatever.

If defendant had the right to plow one or two fields in November and plant rye, he had an equal right to continue plowing throughout the winter, until the whole farm was plowed. He had received written notice in July to vacate on March 1st and apparently acquiesced. Now plowing was done, nor fall planting done, until long after the usual time, and it seems clear to me that his purpose in acting at such late date was to challenge plaintiff to interfere and to advise her of his determination to remain on the farm after March 1st when she claimed the right of entry.

As to the respective rights of the parties at this time I am also at variance with my colleagues. The law upon the subject of the extension and renewal of leases is fairly well settled, but we differ in our application of the law to the facts in this case. I can not enter into a discussion of the evidence. Suffice it to say that the testimony of Dr. Harlan, detailing the conversation in December, 1914, with Veidt, is not disputed and stands as an uncontradicted fact on this record. Veidt's positive statement can not be taken but as a notice that he would leave the

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farm on March 1st. This, in view of his failure to retract what he said, and the failure of plaintiff to make any repairs prior to March 1st, terminated Veidt's tenancy on that date. Then he refused, upon demand, to pay the rent and only paid it immediately after a quarrel with Dr. Harlan in the following June. It makes no difference what the law may be as to mere holding over in the absence of declarations. Such is not this case. It was the proper and natural thing for the new owner to inquire of Veidt what his future intention was with respect to the farm, and Veidt is bound by his unretracted, deliberate answer, followed on March 5th by a similar declaration and his refusal to pay the rent then due under the terms of the lease upon which he now relies.

In discussing the subject, Jones, in his work on Landlord and Tenant, Section 341, says:

"Yet the tenant's announcement of his intention not to accept the extension would override the presumption arising from his continuance in possession." See, also, *Barnett v. Ferry*, 101 Ind., 95.

The reference in the lease to the deed to Mrs. Harlan certainly gave Veidt no greater rights than he then had. Nor did the payment of the rent in June, 1914, for that year to Mr. Walburg, or anything written or said by Veidt at the time to Walburg, have any effect upon the status of Mrs. Harlan. Witness the letter by Walburg to Veidt, of June 15th.

I am of opinion that plaintiff was entitled to an injunction when the action was brought and that right is not impaired by reason of the fact that she asked other relief to which she was not entitled.

This question is so coupled with the other that it is unnecessary to say that I am also of the opinion that defendant's right to occupy the farm ended on March 1, 1915.

INTENT TO STEAL FORMED AFTER THE TAKING.

Court of Appeals for Scioto County.

JOHN PORTER V. STATE OF OHIO.

Decided, December 26, 1917.

Criminal Law—Formation After the Trespass of an Intent to Steal—Constitutes a Felonious Taking—Automobile Taken for a Joy Ride and Afterwards Sold—Conflicting Propositions of Law Embodied in Charge to Jury.

If the original act of taking was a trespass and subsequently while the defendant is in possession of the property he forms the intent to steal, the crime of larceny is committed.

Theodore K. Funk, for plaintiff in error.

Joseph T. Micklethwaite, Prosecuting Attorney, contra.

SAYRE, J.

The defendant and two associates were indicted for grand larceny, charged with stealing an automobile owned by Lawrence Fitch and taken out of his garage in New Boston, Scioto county, Ohio, at night without his knowledge or consent. The machine was driven to Portsmouth and back through New Boston out of Scioto county and through Lawrence county to Huntington, West Virginia, where the same was sold and the proceeds divided between the defendants. There was evidence tending to show that, when the automobile was taken out of the owner's garage, there was no intent on the part of the defendants to steal it but simply to take a "joy-ride." The trial court charged the jury at defendant's request before argument that to constitute larceny the intent to steal must be present in the mind of the defendant at the time of the taking of the property. This instruction was repeated in the general charge, but later therein the jury was instructed that if the intent to steal was formed by the defendant after the taking of the automobile and while he was in Scioto county with it, then the crime of larceny was committed in that county.

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Unquestionably here are two conflicting propositions of law. If the first proposition is correct then there could be no larceny, if the intent to steal arose after the automobile was removed from the garage of the prosecuting witness. If, however, the second proposition is correct then the first proposition, although erroneous, was not prejudicial to the defendant, for the effect of it was only to make it more difficult for the state to prevail and was thus favorable to the defendant. If the first proposition is correct then the giving of the second was highly prejudicial to the defendant because of the evidence tending to show that the original taking was without intent to steal.

The rule announced in *Cyc.*, Vol. 25, p. 46, and in *R. C. L.*, Vol. 17, Section 28, is that the intent to steal must exist at the time of the taking, and very many cases are therein cited as supporting this rule. But a careful reading of the reports will show that the rule is announced in a large number of cases where the original taking was entirely lawful, and it is admitted on all hands that if such was the character of the taking, then there can be no larceny. Two essential elements of larceny are trespass, or asportation by trespass, and the intent to steal, and these must be simultaneous. If the possession was secured without trespass—that is, if the act of acquiring possession was lawful—then the possession remains lawful, and no subsequent act of the defendant in connection with the property can constitute larceny. So if the original securing possession was a trespass, it remains a trespass as long as the possession of the property continues in the defendant, and if to that is added the intent to steal the crime is complete, because both essential elements of larceny are present. (*State v. Coombs*, 55 Me., 477, 92 Am. Dec., 610; *Com. v. White* [Mass.], 11 Cushing, 483; *State v. Davenport*, 38 S. C., 348, 17 S. E., 37; *King v. State* [Ala.], 72 So., 552; *Regina v. Riley*, 14 Eng. Law & Eq. Reports, 554; *Eng. & Am. Encyc. of Law* [2d. Ed.], Vol. 19, p. 507.)

The thought which influences us to adopt the rule, announced in the authorities last above referred to, is that we can see no difference in the character of the act, whether the intent to steal is formed at the time of the taking or thereafter during the time

the defendant has possession, provided the possession was unlawfully secured. Suppose the defendants in this case did not have the intent to steal when they drove the car out of the garage of the prosecuting witness, but did form such intent a half hour later as they were driving along the highway, what difference was there in the character of the act after the intent to steal was formed, than there would have been had the intent to steal been present when possession of the automobile was secured? Certainly there would be none. When there is an unlawful possession secured and kept, followed by the intent to steal, there is a felonious "taking" within the meaning of the technical form of indictment for larceny. To take in this connection means to appropriate for use, to get possession of and hold. The first act of laying hands on the property does not exhaust the meaning of the word "take," but there is included the act of holding for use. So if the defendant unlawfully gets possession of property and keeps the same until he forms the intent to steal, he feloniously "takes" the same when to such unlawful holding there comes the intent to steal. In the case under consideration the "taking" began with the first act of the defendants in moving the automobile. The "felonious taking" began when the intent to steal was formed.

The judgment of the court of common pleas will be affirmed.

MIDDLETON, J., and WALTERS, J., concur.

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**AUTHORITY OF COMMISSIONER TO COMMIT FOR CONTEMPT
IN REFUSING TO ANSWER.**

Court of Appeals for Hamilton County.

SCHOTT, SHERIFF, v. BENCKENSTEIN ET AL.*

Decided, March 18, 1915.

*Depositions—Commissioner Appointed by a Court of Another State—
Witness Refusing to Answer Guilty of Contempt.*

A commissioner, bearing a commission from a court of another state authorizing him to take depositions in this state, can compel the giving of testimony by committing to jail for contempt a witness who refuses to be sworn.

Maxwell & Ramsey, for plaintiff in error.*Bruce & Bruce* and *S. A. Headley*, contra.

JONES (E. H.), P. J.

The sole question presented to this court in this case is whether or not a commissioner bearing a commission from a court in the state of New York, authorizing him to take depositions in this state, can compel the giving of testimony by committing to jail for contempt a witness who refuses to be sworn.

It is well settled by the case of *DeCamp v. Archibald*, 50 Ohio St., 618, that a notary public of Ohio before whom depositions are being taken for use in Ohio can commit to jail a contumacious witness. This authority is unquestionably conferred upon such notary by Section 11510, General Code, which reads as follows:

“Section 11510. Disobedience of a subpoena, a refusal to be sworn, except upon failure to pay fees duly demanded, and an unlawful refusal to answer as a witness or to subscribe a deposition, may be punished as a contempt of the court or officer by whom the attendance or testimony of the witness is required.”

And Sections 11529 and 11530, General Code, provide:

“Section 11529. Depositions may be taken in this state before a judge or the clerk of the Supreme Court, a judge or clerk

*Affirmed, *Benckenstein v. Schott, Sheriff*, 92 Ohio State, 29.

of the court of appeals, a judge or clerk of the court of common pleas, a probate judge, justice of the peace, notary public, mayor, master commissioner, official stenographer of any court in this state, or any person empowered by a special commission.

"Section 11530. Depositions taken in and to be used in this state, must be taken by an officer or person whose authority is derived within the state; but, if for use elsewhere, they may be taken before a commissioner or officer who derives his authority from the state, district or territory in which they are to be used."

The answer to the question propounded to us depends wholly upon the construction of these and other sections contained in Part Third, Title 4, Division 3, Chapter 3 of the General Code, and particularly upon the meaning to be ascribed to the word "officer" as used in Sections 11510, 11530, 11543 and others of said chapter. In the latter section the word "officer" certainly includes one appointed under a special commission to take testimony in another state for use in a court in this state. It follows that the word "officer," used in Section 11510 of the same chapter, in like manner includes the commissioner who may be appointed under Section 11530 to take depositions to be used elsewhere. The word "officer," as used in this chapter, can not be limited to magistrates and others who have taken an oath, given bond, etc., as argued by counsel. In order to make the statutes on the subject consistent and effective, it is obvious, we think, that the word "officer" must be held to include all persons authorized to take depositions.

We are, therefore, of the opinion that the word "officer" as used in Section 11510 was intended to and does embrace a commissioner appointed by a court of another state to take testimony in Ohio. Such being our construction of this section, it follows that the commissioner so appointed has power to punish as a contempt an unlawful refusal to answer as a witness or to subscribe to a deposition.

It is argued that, adopting the above construction, the law is unconstitutional for the reason that the power to punish for contempt is a judicial power which under our Constitution can be conferred only upon a court. This point has been passed upon by our Supreme Court in the case of *DeCamp v. Archibald*, *supra*. We quote from the syllabus, as follows:

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“The power conferred by Sections 5252 and 5254, Revised Statutes, on a notary, or other officer, in taking depositions, to commit a witness to the jail of the county for refusing to answer a question, is not judicial in the sense of the Constitution, conferring all judicial power upon the courts of the state.”

The judgment of the lower court will therefore be reversed and the defendants in error remanded to the custody of the sheriff.

Judgment reversed.

JONES (Oliver B.), J., concurs.

GORMAN, J., dissenting.

I find myself unable to concur in the conclusions of my associates as to the right of the commissioner in this case to commit for contempt.

Section 11510, General Code, provides that a refusal to answer may be punished as a contempt of the court or officer by whom the attendance or testimony of the witness is required. This section provides, therefore, only for the punishment by the *court or an officer*. An officer within the meaning of this section means an *officer of the state of Ohio*; and under Section 2, General Code, a commissioner who derives his authority from a state other than this state is *not an officer of the state of Ohio*.

While a commissioner appointed by authority of another state may take depositions in this state, under favor of Section 11530, General Code, I am of the opinion that the Legislature has simply recognized his right to take depositions in this state when the witnesses appear voluntarily and consent to give their testimony. I do not think that any person can have the power and authority to deprive a citizen of this state of his liberty, unless he be *an officer of this state duly authorized so to do* or a court of this state.

The appellate division of the Supreme Court of New York, in the case of *People, ex rel MacDonald, v. Leubuscher*, 34 App. Div., 577 (54 N. Y. Supp., 869), held: That under the Constitution of the United States (Amendment 14, Section 1), providing that no state shall deprive any person of life, liberty, or

property without due process of law, Section 920, Code Civ. Pro., providing that a person who refuses to testify before a commissioner appointed to take depositions "is liable to the penalties which would be incurred in a like case if he was subpoenaed to attend the trial of an action in a justice court; and for that purpose, the officer, before whom he is required to appear, possesses all the powers of a justice of the peace upon the trial,"—who, under Section 3001, has power to imprison a witness for refusal to testify before him—is unconstitutional as applied to a commissioner appointed by a court of another state to take depositions in that state, and who seeks thereunder to imprison for contempt.

It is also true that Judge Sayler, while on the common pleas bench, in the case of *In re Goodman*, 7 N. P., 201, took the same view of the case pending before him as I take in this case. In the Goodman case he discharged on habeas corpus a witness who was committed by the commissioner appointed by the surrogate court of New York to take testimony in this city. He was of the opinion that the commissioner was not an officer of Ohio, and therefore not authorized to commit for contempt.

The Supreme Court of Kansas, in *In re Huron*, 58 Kans., 152, laid down the same rule as the New York appellate division of the Supreme Court in the case above cited.

Our Supreme Court in the case of *DeCamp v. Archibald*, 50 Ohio St., 618, held that a witness before a notary public, where depositions were being taken to be used in an action pending in this state and in this county, could be committed by the notary, and that the notary had power to commit for contempt of court. But we think that case is distinguishable from the one at bar because a notary public is an officer of this state. He is duly appointed and commissioned by the Governor, is obliged to give bond and take an oath of office, as all officers are required to do under Section 2, General Code.

For the reasons stated I am of the opinion that the judgment of the court of common pleas in discharging defendants in error should be affirmed.

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**DETERMINATION OF THE AMOUNT DUE UNDER THE
BOND OF A DEPOSITARY.**

Court of Appeals for Hamilton County.

THE VILLAGE OF WYOMING V. THE CITIZENS TRUST & GUARANTY
COMPANY OF WEST VIRGINIA.*

Decided, November 5, 1917.

Sureties—Failure of Depositary of Public Funds—Liability of Surety Equal to the Full Face of Its Bond, When—Responsibility for Increase of Bond Where Deposits Are Increased Beyond Amount of Existing Bond—Statutory Provisions Relating to Bonds Given by Depositaries Will be Read Into Such Bonds—Section 4295 as Amended.

1. A bond securing deposits made by a city or village in a designated depositary is a statutory bond into which the provisions of the statute relating thereto must be read, and the surety will be held to have contracted with reference to such statutory provisions.
2. The responsibility for providing for an increase in the amount of the indemnity bond, where deposits are made by the municipality in excess of the sum named in the existing bond, is in the first instance upon the depositary, and where such a situation arises the surety becomes liable for the full face of its bond, and not ninety per cent. thereof.
3. The amount for which the surety is liable, up to the face of its bond, is the amount with interest shown to remain due the municipality after liquidation of the depositary.

S. C. Roettinger and James E. Robinson for plaintiff in error.
Pogue, Hoffheimer & Pogue, contra.

GORMAN, J.

This case is here on error to the judgment of the common pleas court, wherein the judgment below was adverse to the plaintiff in error.

*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, April 11, 1918.

The case was submitted to this court upon an agreed statement of facts to take the place of a bill of exceptions.

From the agreed statement of facts, omitting the immaterial parts, it appears that the village of Wyoming, a municipal corporation in Hamilton county duly organized under the laws of Ohio, designated the Metropolitan Bank & Trust Company of Cincinnati as its depository, and that after competitive bidding it awarded to this bank the contract to receive on deposit in its bank moneys of the village, said bank being the highest and best bidder for said deposits.

A resolution providing for deposit in this bank was duly passed by the council of the village on or about June 1, 1909. The resolution provided that the treasurer of the village was authorized and instructed to deposit the funds of the village in said bank in the manner provided by law and in accordance with the terms of said bid.

Pursuant to the award the bank, as required by law, executed and delivered to the village of Wyoming its bond with the defendant company as surety thereon. Said bond was renewed on the 5th of July, 1910, for a period of one year upon the same terms and conditions as the original bond; and again said bond was renewed on or about the 1st day of July, 1911, for a further term of one year and to continue in force until the close of the banking hours on July 6, 1912.

After the execution of the bond the treasurer of the village in consideration thereof deposited the village funds in said bank commencing on or about July 19, 1909, and from time to time made deposits; and withdrawals were made from time to time to meet the payments ordered by the village council out of the funds.

The amount of this bond was \$10,000; and the renewals were for the same amount in each of the two succeeding years. On the 18th of September, after the second renewal of said bond said bank closed its doors and went into the hands of a receiver under the direction of the state bank examiner of the state of Ohio, this being a state bank, and the payment to its depositors including the plaintiff in error was then and there suspended.

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At the time of its suspension the plaintiff in error had on deposit as principal the sum of \$18,879.11; and there was due on this principal by way of interest the sum of \$427.08; making a total amount of principal and interest belonging to the plaintiff in error, in the bank, the sum of \$19,306.19. The receiver of said bank from time to time paid dividends to the depositors, including plaintiff in error, and finally upon the winding up of the bank's affairs there had been paid to the plaintiff in error on account of its claim, by the receiver, dividends aggregating \$10,618.40, leaving a balance unpaid on its claim of \$9,305.59, with interest.

After the receiver of the bank had paid all the dividends that could be paid out of the assets of the bank the defendant in error, the Citizens Trust & Guaranty Company, paid to the village the sum of \$4,756.50, claiming that this was the entire amount which it should pay on its obligation under said bond. This money was paid by the defendant in error and received by the plaintiff in error without prejudice to the rights of plaintiff in error to assert this claim against defendant in error for the full amount unpaid by the bank or its receiver; and without prejudice to the rights of the defendant in error to resist the claim of the village of Wyoming.

The condition of this bond is as follows:

"The condition of the above obligation is such, that whereas, under and by virtue of a certain proposal of the said The Metropolitan Bank & Trust Company, the said bank has been designated as a depository of the money belonging to the incorporated village of Wyoming, and in consideration thereof, the said bank has agreed to pay to said incorporated village of Wyoming upon such deposits the rate of interest agreed upon.

"Now, therefore, if, during the period beginning on the date of this bond, the said The Metropolitan Bank & Trust Company shall receive, safely keep and pay over all moneys which may come under its custody under and by virtue of the laws of the state of Ohio relating to such depositories, and under and by virtue of the said bank's contract with the said incorporated village of Wyoming, and shall properly account for and pay over, as required, the interest on such deposits at the rate agreed upon, and shall faithfully perform all the duties imposed by the laws of the state of Ohio upon it as a de-

pository of the moneys of said incorporated village of Wyoming, then this obligation shall be null and void; otherwise to remain in full force and virtue."

There are other provisions in the bond by way of provisos which need not be quoted, as they do not in the opinion of the court affect the question involved in this case.

The limit of the liability of the defendant in error was \$10,000, and this it obligated itself to pay to the village of Wyoming provided the Metropolitan Bank & Trust Company defaulted in its payment of the village moneys. In other words, the defendant in error bound itself to the extent of \$10,000 to indemnify and hold harmless the village of Wyoming from any loss which it might sustain by reason of having designated said bank as its depository.

If the loss were less than \$10,000 then the defendant in error did not obligate itself to pay more than the amount of the loss. If the loss exceeded \$10,000, it was obligated to pay only \$10,000.

In the court of common pleas, upon the submission of this cause to the court without the intervention of the jury—a jury having been specially waived—a judgment was rendered in favor of the defendant holding in substance that it had paid all that it was required to pay under the bond and in fact had paid in excess of the amount for which it was liable in the sum of \$311.47, which sum was claimed by defendant in error in the court below on its cross-petition upon which it sought to recover.

It is argued by defendant in error that this being a statutory bond the provisions of the statutes relating to depositories must be impliedly read into the bond or contract—there being no other contract between the village and the Metropolitan Bank & Trust Company except the bond involved in this proceeding. We concur most heartily in the claim of counsel for defendant in error that the provisions of the statute relating to bonds required to be given by the depositories, are impliedly read into the contract or bond.

At the time of the last renewal of said bond the Legislature had made some amendment to the provisions relating to the de-

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positories of municipal corporations, found in 102 O. L., 122, being an amendment of Section 4295, General Code.

In substance that section provides that—

“Council may provide by ordinance for the deposit of all public moneys coming into the hands of the treasurer in such bank or banks, situated within the county, as offer at competitive bidding the highest rate of interest and give a good and sufficient bond issued by a surety company authorized to do business in the state, or furnish good and sufficient surety, or secure said moneys by a deposit of bonds or other interest bearing obligations of the United States,” etc.

A description is given in the section of the kinds of securities that may be given to secure the deposit of funds. And the section further provides that—

“there shall not be deposited in any one bank an amount in excess of the paid in capital stock and surplus of such banks, and not in any event to exceed one million dollars.”

And it further provides—

“that whenever any of the funds of any of the political subdivisions of the state shall be deposited under any of the depository laws of the state, the securities herein mentioned, in addition to such other securities as are prescribed by law, may be accepted to secure such deposits.”

The section further provides—

“said security to be subject to the approval of the proper municipal officers, in a sum not less than ten per cent. in excess of the maximum amount at any time to be deposited.”

Now it is claimed by counsel for defendant in error that this language of the statute being impliedly read into the bond, means that the village of Wyoming would not be permitted under the law to deposit in the Metropolitan Bank & Trust Company at any time more than \$9,091, which would be in round numbers 90 per cent. of the face of this bond; and that if the village deposited more than 10 per cent. less than the amount of

the bond it, the village, did so at its own risk, or it was obliged to provide for an additional security or bond to be given.

But this statute puts the duty upon the bank which is designated as the depository of the municipal corporation to give good and sufficient bond. It does not impose the duty upon the council of the municipality or upon the treasurer of the municipality to see that the bond is given. No doubt it would be the duty of the officers of the municipality to see that a sufficient bond was given in order to protect the village from any loss which might occur; but it does not lie in the mouth of the surety company to say that because the village failed to secure additional sureties or an additional bond, that it is therefore not liable for more than ninety per cent. of the face of its bond. The surety contracted to be liable to the village to the extent of \$10,000, and if the loss of the village reached \$10,000 it would be liable for the full amount of the bond.

In the case under consideration the loss of the village was less than \$10,000. It suffered no loss except that which the bank failed to pay. The fact that it had on deposit more than \$19,000 when the bank closed its doors does not establish a loss of \$19,000. After the bank had closed its doors the village received on its claim more than \$10,000 paid to it by the receiver of the bank, and, manifestly, to the extent that it received payment on its deposit in this bank there was no loss. Its only loss was the amount which the bank failed to pay upon the winding up of its affairs.

We do not think it necessary that any authorities be cited in order to establish this plain proposition. The plaintiff in error (plaintiff below), was entitled to recover from the defendant in error, upon the agreed statement of facts the amount which the Metropolitan Bank & Trust Company failed to pay on account of the sum of moneys on deposit in said bank. This amount, \$9,305.59 with interest, less the amount voluntarily paid by defendant in error, \$4,756.50, leaves a balance of \$4,642.10 with interest—this being the total amount claimed by plaintiff in error in the action at law.

The court of common pleas having erred in rendering judgment in favor of the defendant in the amount rendered, when

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it should have rendered judgment for plaintiff in the sum of \$4,642.10 with interest, and there being no question of fact involved in the case but only a question of law, we hold that the judgment of the common pleas court should be reversed and judgment entered in this court in favor of the plaintiff in error for the amount of \$4,642.10 with interest, as claimed in the petition.

Judgment accordingly.

JONES, P. J., and HAMILTON, J., concur.

**WHEN A DECREE FOR ALIMONY MAY NOT BE
REOPENED.**

Court of Appeals for Ross County.

GEORGE CLOUGH V. ISABELLA LONG ET AL.

Decided, January 21, 1918.

Alimony—Continuing Jurisdiction of the Court Awarding a Decree—May Not be Asserted, When—Payment of a Gross Sum Usually Ends Jurisdiction—An Award of Real Estate is Final and May Not be Modified at a Subsequent Term.

1. While as a general rule the jurisdiction of a court in alimony proceedings is a continuing jurisdiction, it does not necessarily follow that every decree in alimony may be open to change or modification and that the court may not by its decree, or the parties by their agreement when the same has been judicially sanctioned by a decree of the court, completely foreclose any right to a future revision or change thereof.
2. When a gross sum is allowed as and for alimony and full payment thereof has been made, such allowance is generally recognized as a final adjudication of the rights of the parties and the court's jurisdiction is at an end.
3. Real estate, decreed in fee simple as an allowance in gross for alimony, is final in so far as it relates to such property, and the court has no jurisdiction to modify or change such a decree at a subsequent term.

Elijah Cutright, Jr., George B. Okey and C. A. Radcliffe, for plaintiff in error.

John P. Phillips and Lyle S. Evans, contra.

MIDDLETON, J.

Plaintiff in error was the plaintiff below in an action which he instituted on April 6, 1916, to recover possession of and title to certain real estate. In his original petition he alleges, in substance, that by the consideration of the court of common pleas of this county on the 12th day of December, 1897, Virginia Clough, then the wife of the plaintiff, obtained a decree of divorce and award of alimony against him; that said allowance in alimony was one in gross for the sum of \$2,500 in money and the undivided one-third of a certain farm, situate in said county and known as the Crookham Farm, containing 775 acres more or less, and that the terms of the decree provided that the said Virginia Clough should "have, own, possess and enjoy in fee simple, as and for alimony," the equal undivided one-third part of said real estate. The petition further states that subsequent to this decree, and on or about the 23d day of March, 1898, the plaintiff, never voluntarily consenting to said decree and award and never agreeing for a division of his property, but solely for the purpose of carrying said decree and award into effect, and for no other purpose and upon no other consideration, whatsoever, executed a deed to said Virginia Clough for certain real estate then and theretofore the property of plaintiff. A full description of the lands so conveyed by said deed is set out in the petition, and it appears therefrom that they amounted to about 369 acres. It further appears from this deed, which is set forth in the petition in full, that in addition to the alimony awarded Virginia Clough the plaintiff received a further consideration of approximately \$5,000 by Virginia Clough agreeing to discharge certain indebtedness of plaintiff amounting to that sum. While the petition does not state that the land so conveyed was the land awarded in the decree, it is to be assumed from certain references in the deed that it included the land so awarded and in addition certain

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other lands which were conveyed presumably for the additional consideration.

The plaintiff further recited in his petition that this property so conveyed was ancestral property and that the said Virginia Clough went into the possession of the same and had enjoyed the rents and profits thereof until her death on the 27th day of November, 1910, and that on the 30th day of December, 1910, her last will and testament was filed for probate in this county, wherein the said Virginia Clough attempted to devise to the defendants in error the real estate described in said deed.

He further alleges in his petition that the purpose of said conveyance, in compliance with said order, decree and award, was for the support and maintenance of Virginia Clough during her lifetime, and that said real estate having been so used by her during her life, at her death her rights thereto terminated and said real estate reverted, and was intended by the plaintiff and the order, decree and award of the court to revert to him.

The prayer of the petition is that the title to said real estate be re-invested in the plaintiff and that said award of alimony be modified so as to limit the title of said Virginia Clough to and in said real estate to a life estate.

A demurrer to this petition was filed in the court below, which was sustained, and the plaintiff not desiring to plead further judgment on said demurrer was rendered, and he now prosecutes these proceedings to reverse that judgment.

It seems to be conceded by counsel for both parties that the plaintiff in error's right of action and the sufficiency of his petition depends upon the question as to whether or not the court of common pleas of this county has a continuing jurisdiction in the matter of the alimony awarded Virginia Clough, and that the original action for said alimony continued to be and is now pending in said court. While we do not consider this question may be wholly determinative of the issues presented by the petition, in view of other questions that might arise in respect to the deed subsequently executed by George Clough to

Virginia Clough, it may be assumed for present purposes that the right now to modify this decree is decisive of the whole case.

It is contended in support of plaintiff's right of action that the allowance of alimony rests wholly upon the marital obligation of maintenance and support and to a great extent is limited to that purpose only, and that the jurisdiction of the court in an alimony matter is a continuing jurisdiction and that the court has full authority at any time subsequent to any allowance of alimony to revise, change or modify the same.

We are not disposed to question seriously any of the propositions so urged, and especially the proposition that the jurisdiction of the court in alimony proceedings is ordinarily a continuing jurisdiction. That question seems to be definitely settled, in this jurisdiction at least, by the case of *Olney v. Watts*, 43 O. S., 499, and the very recent case of *Smedley v. State*, 95 O. S., 141, in which latter case it is said that—

“It is well settled that the jurisdiction of a court in an alimony case is continuing.”

We are not, however, inclined to accept the rule so announced in this latter case as exclusive, especially in view of the character of the alimony involved in that case and of the award made therein. While, as we have observed, we admit as a general proposition that such jurisdiction is continuing it does not necessarily follow that every decree in alimony may be open to change or modification and that the court may not by its decree, or the parties by their acts and agreement when the same have been judicially sanctioned by a decree of the court, completely foreclose any right to a future revision or change thereof. *Petersine v. Thomas*, 28 O. S., 596; *Law v. Law*, 64 O. S., 369; *Hribal v. Hribal*, 11 C.C.(N.S.), 414.

In the case of *Petersine v. Thomas*, *supra*, the court, speaking through Judge Ashburn, say in respect to this question:

“Once this discretionary power of the court, in allowing alimony, has been fully exercised in a case, it is ordinarily at an end—exhausted. So that, when once the court has allowed to the wife what it considers just and equitable alimony in gross,

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and a divorce is at the same time granted, she will be deemed to have been allowed her just and equitable portion of her husband's estate. The court may, however, in the exercise of a sound discretion, grant the divorce, and make the alimony allowed payable in installments, and by continuing the alimony branch of the case, hold the parties and subject-matter, by proper orders, so under its control as to increase or diminish the allowance as equitable circumstances and justice shall require."

In *Law v. Law*, *supra*, it is held unequivocally that—

"Where the terms of a decree as to the alimony are fixed by the court, pursuant to an agreement of the parties, they are not subject to modification."

■ ■ ■

When a gross sum is allowed the courts generally recognize it as in full satisfaction of all claims and regard the award so made as final and the awarding court's jurisdiction at an end unless there is some statutory authority continuing its jurisdiction. *Plaster v. Plaster*, 47 Ill. App., 290; *Stratton v. Stratton*, 73 Me., —; *Mitchell v. Mitchell*, 20 Kan., 665; *Sammis v. Medbury*, 14 R. I., 214; *Kamp v. Kamp*, 57 N. Y., 212; *Johnson v. Johnson*, 65 Ho. Prac., 517.

In the case of *Shaw v. Shaw*, 59 Ill. App., —, the court say:

"Where in a decree for divorce the wife is given a gross sum as her alimony, it is held to be in full discharge and satisfaction of all claims for future support. So far as the decree relates to that subject it is at an end and the court has no jurisdiction to modify it at a subsequent term."

In a case where a gross sum has been allowed and paid, and the decree of the court fully executed, we have found no case, nor has any been cited to us, which would authorize the court to deny such a decree the same finality with which other judgments are regarded. We think it may be deduced from the authorities on this question that whether the jurisdiction is continuing or not depends wholly on the character of the decree itself and whether it has been executed and full payment made thereunder or not.

Referring now to our statutory provisions on this subject. It is provided in Section 11998, General Code, that—

“Upon satisfactory proof of the charges in the petition the court shall * * * give judgment in favor of the wife for such alimony out of her husband’s property as is equitable, which may be allowed to her in real or personal property, or both, or in money, payable either in gross or by installments.”

It is settled in *Gallagher v. Fleury*, 36 O. S., 590, and *Herron v. Herron*, 47 O. S., 544, that real estate may be decreed in fee simple as an allowance in gross for alimony. The decree in the instant case is one of this character. It is one wholly unconditional. There is no reservation, either express or implied, in any of the conditions of the court’s order and decree which would suggest that the court intended it to be subject to any future revision or modification. It was in every respect, therefore, a finality so far as the court could make it such. It was expressed in terms which left no doubt whatever that the court intended it to be a final adjudication of the rights and obligations of both parties.

There is nothing disclosed in the petition to justify the claim therein that this real estate was intended by “said order, decree and award to revert to the source from which it came,” and this allegation must be regarded as a mere conclusion of the pleader without any support thereof to be found in any other statement in the petition.

In *Herron v. Herron*, *supra*, the court say:

“This transfer of title was not by any act of the husband, but by the fiat of the court. Hence it is to the purpose of the court we must look, and not the purpose of the husband. The decree is not difficult of construction. It explains itself.”

While the title in the instant case was conveyed by an act of the husband, yet the consideration for that act is the title conveyed by the decree of the court, and that title as so conveyed is the title which must control the jurisdiction of the court in respect to a modification thereof. It is not, therefore, to the purpose of the husband that we must look in this case, but the

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purpose of the court in its original award, and if the husband misconceived the latter's purpose and the scope and effect of its decree he did so at his peril.

The court continuing in *Herron v. Herron* say:

"The title received by the wife was as full and ample as though a conveyance from the husband had been made, and she took a title in fee simple. She took as a purchaser."

So in the instant case Virginia Clough, by virtue of this decree, took a title in fee simple to the lands included in said decree as a purchaser, and a subsequent conveyance of said lands by her husband could not in any manner affect her title thereto theretofore conveyed to her by the decree of the court.

We conclude that the decree for alimony involved in this controversy is one not subject to any change or modification, and that any subsequent change in the conditions or circumstances of either party to the original action may not be considered by the court of common pleas as affecting in any manner the finality of its former decree.

The judgment of the court of common pleas is affirmed.

WALTERS, J., and SAYRE, J., concur.

**CONSENTING TO A CONTINUANCE CONFERS JURISDICTION
ON A MAGISTRATE.**

Court of Appeals for Clinton County.

CLUXTON V. SMITHSON.

Decided, June 9, 1915.

Justice of the Peace—Where Action is Within Jurisdiction of—Appearance and Consent to Continuance—Bars a Motion to Dismiss for Want of Jurisdiction.

When the subject of an action is within jurisdiction of a justice of the peace, and the defendant, without objecting to the jurisdiction of the justice of the peace over his person, appears and consents to a

continuance, before the filing of a motion to dismiss for want of jurisdiction, such defendant thereby confers jurisdiction of his person upon the magistrate.

Hayes & Hayes, for plaintiff in error.

H. S. Pulse, contra.

JONES (OLIVER B.), J.

This action below was one brought in the court of common pleas seeking to enjoin defendant in error, C. E. Smithson, from causing an execution to issue upon a certain judgment taken against plaintiff in error before J. A. Saunier, a justice of the peace in and for Jefferson township, Clinton county, Ohio.

The petition states that Clayton Cluxton was on the 19th of March, 1913, and for many years prior thereto, a resident and freeholder of Clark township, Clinton county; that there were then two justices of the peace duly elected, qualified and acting as such in said Clark township, neither of whom was interested in the controversy or disqualified under the terms of Clause 3 of Section 10225, General Code, and therefore not competent to try the cause; and that notwithstanding said fact the defendant filed with J. A. Saunier, justice of the peace of Jefferson township, a certain bill of particulars against plaintiff claiming a money judgment for violation of a contract and upon an account for work and labor. It appears further from the petition that the justice of the peace made an entry in said case upon his docket, stating that it appeared to his satisfaction that the defendant (Cluxton) was a resident of Clark township of said county, which is an adjoining township to Jefferson township, and that there was no justice of the peace in said Clark township competent to try said cause, and that he therefore took jurisdiction of said cause.

A summons was duly issued and served upon the defendant in that action, and although the entire proceedings are not set out in the petition in this action enough is stated to make it appear that certain continuances were had from time to time in said cause, some of which were by the act of the defendant,

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Cluxton; and that afterwards defendant there filed a motion seeking to dismiss the action because of the want of jurisdiction of said justice of the peace for the reason that defendant was then a freeholder and not a resident of Jefferson township, and did not come within any of the exceptions contained in Sections 10224 and 10225, General Code.

This motion was overruled by the magistrate and further proceedings were had which resulted in a judgment against the defendant, who then brought this suit seeking to enjoin execution under said judgment, and to have such judgment set aside and held for naught.

A demurrer to the petition was sustained in the court below, and judgment was entered in favor of the defendant. Error is prosecuted here to reverse that judgment.

The facts set out in the petition as above stated satisfy the court that Cluxton entered a general appearance consenting to continuance before the filing of his motion in the justice's court to dismiss for want of jurisdiction, and therefore conferred jurisdiction of his person upon the magistrate. The subject-matter of the action was one over which the court had jurisdiction, and the appearance without objection to that jurisdiction at the time the continuance was arranged for gave the justice jurisdiction of the person. In *P., C. & St. L. Ry. Co. v. Fleming*, 30 Ohio St., 480, the second clause of the syllabus is as follows:

"Where the subject of the action is within the jurisdiction of a justice of the peace, and the parties appear before such nearest justice, agree upon a day of trial, which is assented to by the justice and thereupon the defendant demands a jury, which is awarded him, he thereby waives all objection to the jurisdiction of such justice to try the case."

The finding made by the magistrate upon which he took jurisdiction, which is set out in full in the petition, should have stated the reasons why neither of the two magistrates in Clark township was then competent to try said cause. But under the liberal construction that is allowed to the record of an inferior court, in reviewing its proceedings, this clause might itself be

considered sufficient, so long as reasons contrary to the finding of the justice do not appear upon the record. *Beebe v. Scheidt*, 13 Ohio St., 406, 416, and *McCurdy v. Baughman*, 43 Ohio St., 78.

The defendant before the magistrate, to preserve his rights, could have introduced evidence showing the competency of one of said magistrates of Clark township, to support his motion, and could have brought error proceedings from the court of the justice of the peace to the common pleas court and have thus procured a reversal of any judgment entered against him; having failed to pursue this right under the law equity will refuse him a remedy.

“The authority of a magistrate can not be collaterally attacked. A resident householder of one township being sued before a magistrate in another township, going to trial on the merits of the case without objection to the jurisdiction of the magistrate over him, will be taken to have waived his right to so object.” *Caldwell v. High*, 6 W. L. B., 201.

The demurrer to the petition was properly sustained, and the judgment is affirmed.

Judgment affirmed.

JONES (E. H.), J., and GORMAN, J., concur.

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FEES TO COUNSEL FOR WIVES IN ALIMONY CASES.

Court of Appeals for Hamilton County.

L. C. BLACK AND JAMES B. SWING, ATTORNEYS OF RECORD OF
MADGE MAY STEWART, ETC., v. WOODFORD T. STEWART.*

Decided, June 17, 1918.

*Divorce and Alimony—Proper Procedure Where no Remuneration Has
Been Provided for Counsel—Application for an Allowance Cover-
ing Fees Should be Made by the Wife—Not by Counsel for Their
Own Benefit—Error or Appeal May Not be Prosecuted by One
Not a Party to the Proceedings Below.*

1. Where in a divorce or alimony proceeding the wife dismisses her action without the knowledge of counsel and without compensating them for their services, the said counsel, not having been parties to the action, are without authority to file a petition in error for the purpose of reversing the order of dismissal and interposing a motion for an allowance for counsel fees and expenses, to be paid to them by the defendant and to be made a charge against his property.
2. While it is proper and the court has full power to make, on the motion of the wife, an allowance for her sustenance and necessary expenses, including reasonable counsel fees, such a motion does not lie where made, not by the wife but by counsel acting in their own behalf, and without leave of court.

*George B. Goodhart, Samuel L. Hagans, John W. Peck, for
plaintiffs in error.*

Harmon, Colston, Goldsmith & Hoadly, contra.

JONES, P. J.

In this proceeding in error it is sought to review and set aside the action of the court of common pleas, division of domestic relations, in an action for alimony brought by Madge May Stewart, a wife, against Woodford T. Stewart, her husband, wherein it denied a motion filed by the attorneys of plaintiff on their own behalf for an allowance of counsel fees and ex-

*Affirming *Stewart v. Stewart*, 20 N.P.(N.S.), 273.

penses to be paid them by defendant and to be made a charge against his property, and granted a motion made by the defendant to dismiss said case upon the payment by him of costs and enter a judgment of dismissal of said cause.

The facts of the case are stated in the opinion of the trial court which is reported under the name of *Stewart v. Stewart*, 20 N.P.(N.S.), 273, where the language of the motions upon which the court acted is given in full.

A motion to dismiss the petition in error was interposed here by defendant in error on the ground that plaintiffs in error were not parties to the case in the court of common pleas, and have therefore no right to file a petition in error to reverse any judgment or order made in said case in that court.

As the same questions are involved, the motion to dismiss was argued and submitted along with the error proceeding itself.

According to the established practice no one can appeal from a judgment or decree, or bring a writ of error to review it, unless he was a party to the action below, or was made so either by an express order of the court to that effect or by being treated as such, or unless he is a legal representative of a party, or his privity of estate, title or interest appears from the record. (2 Cyc., 626.)

In *Hanover v. Sperry*, 35 O. S., 244, in the opinion of the court McIlvaine, J., said (p. 245):

"In general, a petition in error must be prosecuted by a party to the record."

Section 5226, Revised Statutes, now Section 12224, General Code, which has been held unconstitutional in *Wagner v. Armstrong*, 93 O. S., 443, allowed appeals to be taken "by a party or other person directly affected, from a judgment or final order," but there is no such provision as to error cases, and the rule is that error can ordinarily be prosecuted only by parties to the original action or their privies.

An exhaustive note with the citation of many cases on the right to prosecute error or appeal is found in the report of *In re Switzer*, 119 Am. St. Rep., 729. In it appears the following language:

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"Both by the common law practice and that obtaining in chancery, a writ of error could be prosecuted or an appeal taken only by a party, and this is the rule both in the courts of the United States and in those of all the states purporting to give a right to appeal or to prosecute a writ of error to any party aggrieved. Under these statutes third persons no matter how much they may be prejudiced by the judgment, decree or order, can not obtain its review by appeal or writ of error."

Among the many cases cited to sustain this position is *Reid v. Quigley*, 16 Ohio, 445.

The general rule is that an attorney can not, in his own name and on his own motion, appeal from a judgment or decree affecting the interest of his client. 2 R. C. L., 735; 2 Cyc., 639; 119 Am. St. Rep., 758; *Nat'l Bk. v. Lanahan*, 60 Md., 477; *Besancon v. Brownson*, 39 Mich., 388; *Pereyra's App.*, 126, Pa. St., 220; *Stager v. Stager*, 165 Ill., 579; *Anderson v. Stager*, 173 Ill., 112.

"A proceeding for alimony does not invoke the equity powers of the court, but is controlled by statute. The court is only authorized to exercise such power as the statute expressly gives, and such as is necessary to make its orders and decrees effective." *Marleau v. Marleau*, 95 O. S., 162.

While the court is controlled by statutes and does not exercise general equity jurisdiction in alimony cases (*Dewitt v. DeWitt*, 67 O. S., 340), it has full power under G. C. 11994 to provide for the wife's sustenance and her expenses during the suit, but the allowance should be made to the wife. It is proper to include reasonable counsel fees—which may be fixed by the court for her attorneys—in the expenses allowed to her for their benefit. A motion for such allowance, however, should be made by the wife as a part of her necessary expenses, and in such event it is the province of the court and a duty owing by it to its own officers to see that their interests are protected.

A motion for the allowance of counsel fees and expenses was filed in this case without any leave of court, not on behalf of the plaintiff but, as its terms clearly set out, it asked an order

from the court to allow a reasonable sum to be paid by said defendant direct to them as compensation for their necessary and proper legal services, to be made a charge upon his real and personal property, and also for certain necessary expenditures made by them as attorneys for plaintiff. The motion first stated that the plaintiff and defendant had agreed upon a settlement of the case—such statement being made possibly as a reason for filing the motion in their own names, although no leave was asked or given by the court—and the motion finally asked that the cause be not dismissed until such attorney fees and expenditures had been so determined and paid. No claim was made that counsel were at that time acting on behalf of plaintiff but, although there is nothing in the record to show any direct communication to them from their client to such effect, they seemed to regard the notice of plaintiff's desire to dismiss the cause, received by them from counsel for defendant, as an effective withdrawal by her of their power to further act in plaintiff's behalf.

The motion to dismiss the case was filed not by the plaintiff but by the defendant, but the record shows that an order or request was addressed to the clerk of the court of common pleas by plaintiff directing the dismissal of the cause upon the payment of court costs by the defendants or either of them, and directing further that the property attached by virtue of said suit be released without any charter of claim or lien against it. Plaintiff's order was dated November 12, 1917, but was not filed in the case until November 30, 1917, the motion to dismiss having been filed November 15, and the motion for allowance of counsel fees was filed November 14, 1917. Under the provisions of G. C. 11586 plaintiff had power to dismiss her case at any time before its final submission.

An exhaustive and able brief has been filed by plaintiffs in error, citing 2 Nelson on Divorce and Separation, Sections 875 *et seq.*, and many cases from other jurisdictions, to sustain their position that an attorney who appears for the wife and does not look to her for compensation for his services has a right to proceed with an action for alimony with the assurance that

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a suitable fee will be awarded him by the court, unless his case is without merit or probable cause. This position is sustained by the text and by numerous cases from other states, notably Indiana and New York, but these cases are dependent upon the statutes of those states, which differ from the statutes of Ohio.

It is not deemed necessary to review the cases cited or to further discuss the question involved, inasmuch as the trial court has rendered a complete and admirable opinion which has been reported as above stated, and which fully meets the approval of this court.

In a case brought by a wife against her husband where the attitude of the parties is dependent upon the varying moods of persons of opposite sex in the intimate relations brought about by marriage, and conditions make it impractical for counsel to secure themselves reasonable compensation, it would be the part of wisdom to protect their interests by an early application for an allowance of alimony *pendente lite* sufficient to afford them some remuneration for professional services, always more or less unpleasant for lawyers, but which while of great benefit and necessity to the client are often too lightly appreciated after results have been obtained.

It appears unfortunate that in this case the motion for such allowance was not duly presented on behalf of the wife before her determination to dismiss the case had been concluded, but under the circumstances of the case as presented it would appear that the plaintiffs in error have a clear right as against the wife herself, and that the court below was without power to grant the order prayed for.

This court is forced to the conclusion that plaintiffs have no standing here to review the judgment of the court below by their error proceeding in this case, and the motion to dismiss must therefore be granted.

WILSON, J., and HAMILTON, J., concur.

**DUTY OF LANDLORD WITH REFERENCE TO PREMISES
ABANDONED BY TENANT.**

Court of Appeals for Mahoning County.

KATE E. WHITE V. GEORGE M. SMITH.

Decided, October 11, 1917.

Landlord and Tenant—Abandonment of Premises by Tenant—Landlord Not Legally Bound to Relet.

Where a tenant abandons the leased premises, the landlord is under no legal obligation to relet such premises, and in an action to recover the rentals accruing after such abandonment the tenant can not interpose as a defense want of reasonable diligence to re-rent the same.

McKain & Ohl, for plaintiff in error.

William Zimmerman, contra.

FARR, J.

This is a proceeding in error prosecuted in this court from the judgment of the Court of Common Pleas of Mahoning County. The parties sustain the same relation here as in the court below.

On the 28th day of January, 1916, plaintiff in error began an action in the municipal court of the city of Youngstown against defendant in error to recover the sum of \$168 and costs; the principal part of said sum for which recovery was sought was for certain installments of rentals falling due by the terms of a certain agreement in writing made and entered into between said parties for the period of one year, beginning on the 1st day of May, 1915, for the use and occupancy of certain premises belonging to plaintiff in error and situated at 360 Crescent avenue, Buffalo, N. Y.

To the statement of claim of plaintiff below, the defendant filed a statement of defense claiming that on or before the 31st day of October, 1915, he surrendered his lease to plaintiff, and delivered possession of said premises to her, and that

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such surrender was duly accepted and that thereupon plaintiff rented or could have rented said premises to another tenant at a rental equal to that specified in the lease. Trial was had and a judgment entered for plaintiff in the sum of \$158.50. An appeal was taken to the court of common pleas of this county, where said cause was tried to a jury and a verdict rendered for the defendant upon which judgment was entered and from which error is prosecuted here.

There are two principal assignments for error: First, that the court erred in its charge to the jury; second, that the verdict is against the weight of the evidence. That part of the charge of the trial court for which error is assigned reads as follows:

"If he left the premises, then there was an obligation resting upon the plaintiff, and that obligation was in law that she should, in good faith, exercise due diligence in attempting to find a tenant; but, if she in good faith, exercised due diligence to obtain a tenant and failed to obtain one, then she can recover for this amount if she could not obtain a tenant until the first day of April, 1916. But if, on the other hand, she did not exercise good faith, and exercise reasonable diligence to obtain a tenant, then I say to you from the time she could have obtained a tenant, then she is not entitled to recover."

The record discloses and it is conceded that the defendant, Smith, vacated said premises on or about the 22d day of October, 1915, but paid the rent to the 1st day of November following. On October 25, 1915, James R. White, who in the rental of said premises, had acted as the agent of his sister, Kate E. White, wrote Mr. Smith inquiring as to what he purposed to do in regard to said lease, stating that as the same did not expire until the first of the next May, that he had no other alternative than to hold him to the terms of the lease. The record discloses that an effort was made by Kate E. White or her agent to secure a suitable tenant but none was obtained and said premises were not relet until April 1, 1916, after which no rentals are claimed. Testimony was offered by the defendant for the purpose of showing that plaintiff consented to the surrender of said premises by defendant and that plaintiff

failed to use reasonable diligence to relet the same, and it is also urged in argument, and in fact it is the principal issue raised, that when the defendant vacated said premises, it was the duty of plaintiff to use reasonable diligence to re-rent the same; or, in other words, it is claimed that if a lessee abandon the leased premises before the expiration of his term, it is the duty of the lessor to use reasonable diligence to relet said premises and if he fails to do so he can not recover the installments of rental accruing after such abandonment.

In *3 Sutherland on Damages*, Section 844, p. 3111, it is provided that:

“The landlord is under no obligation to rent premises which have been abandoned by a tenant.”

Numerous cases are cited in the note to and in support of the foregoing text. Likewise it was held in *Gray v. Kaufman Dairy & Ice Cream Company*, 41 N. Y. Supp., 73, as follows:

“Where a tenant abandons the demised premises, it is not the duty of the landlord to relet, in order to reduce his claim for damages against the tenant.”

To the same effect it is held in *Merrill v. Willis*, 51 Nebr., 162, 70 N. W., 914; *Becar v. Flues*, 64 N. Y., 518; *Mfg. Co. v. Dinwiddie*, 116 N. Y. Supp., 716; *Milling v. Becker*, 96 Pa. St., 182; *Underhill v. Collins*, 15 N. Y. Supp., 495; 132 N. Y., 269; 30 N. E., 576; likewise in 24 Cyc., 923, note 18, and *Goldman v. Boyles*, 141 S. W., 283, 6th paragraph of the syllabus.

And in *Ran v. Baker et al*, 118 Ill. App., 150, it was held that:

“Where a tenant wrongfully abandons demised premises, he can not interpose the want of diligence of his landlord in failing to re-rent the premises as a defense to an action for the rent accruing after such abandonment.”

The foregoing is well in point with the instant case, in which the want of diligence on the part of the landlord to relet is sought to be interposed as a defense.

In the well considered case of *Higgins v. Street*, 13 L. R. A. (N. S.), 398, it is held that:

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"If a tenant wrongfully abandons leased premises before the expiration of the term, the landlord may, at his election, at once enter and terminate the contract and recover the rent due up to the time of abandonment, or he may suffer the premises to remain vacant and sue on the contract for the entire rent, or he may give notice to the tenant of his refusal to accept a surrender, when such notice can be given, and sublet the premises for the unexpired term for the benefit of the lessee to reduce his damages."

The foregoing is clear and explicit and is supported by many cases of favorably recognized jurisdictions. And why not? A lessor and lessee enter into a valid contract for a fixed and definite period, during all of which the lessee is for some purpose the owner of the demised premises and may exercise dominion and control over the same, even to the exclusion of the lessor; therefor it is but fair that the lessor should rely upon him to do so. The lessee may rely and rest upon the letter of his contract, and occupy without let or hindrance to the end of his term; the lessor has equal rights and may depend upon the lessee to do so or pay his rentals just the same. The lessor may elect to do otherwise, and if able to secure a suitable tenant may relet such premises and under such circumstances it might be said would be morally bound to do so, as observed in *Shipman v. Stone*, 16 C.C.(N.S.), 468, as follows:

"It is the landlord's moral duty, if not his legal duty, to ease the tenant by reletting for the best rent he can get, and his so doing does not of itself work a surrender of the lease."

However, the landlord is in nowise legally obligated so to do. He may rest upon the terms of his rental agreement and leave the disposal of the demised premises for the remainder of the term at the option of the lessee. Said instruction might be further criticised for the reason that the jury might well have understood from it that the lessor was bound to relet said premises to any one willing to rent the same, whether such prospective lessee be desirable as a tenant or not, and in any event such is not the rule of law to be applied.

Therefore, the above instruction by the trial court was prejudicial error. Application of the foregoing principles would

necessarily work a reversal on the weight of the evidence, and the judgment is therefore reversed.

POLLOCK, J., and METCALFE, J., concur.

DETERMINATION AS TO OWNERSHIP OF RETAINED PERCENTAGES.

Court of Appeals for Hamilton County.

BOLAN V. THE MITCHELL BRICK CO.

Decided, July 6, 1915.

Proceedings Against a Contractor in Aid of Execution—Retained Percentages Found to Belong to Contractor's Wife—Homestead Claimed and Allowed—Concealment of Property by Debtor Which is Not in Custody of the Court.

Thurber & Browning, partners, entered into a contract with the state of Ohio to build a road known as the New Richmond turnpike for the sum of \$12,000, and thereafter assigned this contract to Mary B. Bolan. The assignment was not made a matter of record, and \$1,183.40 was paid to Thurber & Browning on account of work done on the road by Mary B. Bolan. Under the contract the state was to retain 15 per cent. of the estimates until the work was finally completed, and under this provision \$208.85 was retained by the state.

Held: In a proceeding in aid of execution to reach the property of John M. Bolan, husband of Mary B. Bolan, the \$208.85 retained by the state was the property of Mary B. Bolan. Under the above-stated facts, the doctrine has no application that, where a debtor entitled to exemption in lieu of a homestead conceals money and property which he has a right to have at the time of the examination and has other property in the custody of the court, his concealment of property not in the custody of the court should be deemed to be an election on his part to take that property as a part of his claim in lieu of a homestead.

Frank E. Wood and Charles Sawyer, for plaintiff in error.
Froome Morris, contra.

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GORMAN, J.

The defendant in error at the April term, 1913, of the common pleas court recovered a judgment against the plaintiff in error, John M. Bolan, for \$755.49. Execution was issued and returned *nulla bona*. The judgment remained unpaid and unsatisfied. Thereafter, in the October term, 1914, defendant in error instituted proceedings in aid of execution against the plaintiff in error, making the German National Bank, the Gordon Engineering Company and Mary B. Bolan, wife of the plaintiff in error, parties as garnishees, and the court enjoined the parties from disposing of any property in their hands belonging to plaintiff in error.

A referee was appointed to take the testimony and report to the court, all of which was done, and the report filed. Among other things the report of the referee found that there was a credit due to John M. Bolan from the German National Bank of Cincinnati, of \$283.05; and from the Gordon Engineering Company, \$250.80. The referee further found that John M. Bolan had been carrying on a contracting business all his life, and during the last four years had been apparently carrying on his business in his wife's name. The referee further found that the defendant, John M. Bolan, and Mary B. Bolan, his wife, sought to make it appear that there was either no money due from the Gordon Engineering Company or that such as was due was due on account of work done by the wife under her individual contract; and he found that both these contentions were utterly false.

After the report of the referee was filed there was a further hearing of evidence in the common pleas court, and it then developed that Thurber & Browning, partners, had entered into a contract with the state of Ohio to build a road known as the New Richmond Turnpike for the sum of \$12,000; that Thurber & Browning had assigned their contract to Mary B. Bolan for the consideration of \$800 and that she had given her note to them for \$800, payable when the work should be completed; that \$1,183.40 had been paid by the state on account of this contract; and that Thurber & Browning had paid this money to Mary B. Bolan. The assignment of the contract was not made a

matter of record by the state, and the money was therefore paid to the original contractors, Thurber & Browning, and by them turned over to Mary B. Bolan. Under the contract the state was to reserve 15 per cent. of the estimates until the work was finally completed, and on account of the work finished there was retained by the state the sum of \$208.85, which sum was not due at the time of the hearing, and would never be due unless the work was completed—or until the work should be finally completed and accepted by the state.

The common pleas court held that this \$208.85 not yet due was the money of John M. Bolan, and the court further found that there was a credit due Bolan in the German National Bank, \$283.05, and from the Gordan Engineering Company, \$250.80. Bolan made demand during the progress of the trial to have the money on deposit in the German National Bank and the money due from the Gordon Engineering Company set off to him as exempt from levy and execution—he being a married man, the head of a family, and not the owner of a homestead. The court of common pleas held that the \$208.85, the retained percentage of the state, belonged to Bolan, and that he had concealed this asset and by that act had elected to select that \$208.85 as a part of his exemption in lieu of his homestead. The court allowed Bolan his exemption of \$500 under the statute, but made the allowance as follows

Retained percentages	\$208.85
Due from Gordon Engineering Co.	250.80
<hr/>	
Making	\$459.65

In addition thereto the court allowed from the amount of money on deposit in the German National Bank the sum of \$40.35, to make up amount of the exemption in lieu of a homestead, \$500.

We are of the opinion that the \$208.85 was not the money of John M. Bolan, but that under the contract between his wife Mary B. Bolan and Thurber & Browning these retained percentages under the contract with the state of Ohio belonged to Mary B. Bolan, if they ever became due, which they were not at the

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time of the hearing. Mary B. Bolan may never realize anything out of these retained percentages; she can secure the retained percentages only if she completes the work on the New Richmond turnpike, and there remains more than \$10,000 worth of work yet to be done on that job. Complications may arise which would prevent her from recovering these retained percentages even if the work were finished. We are of the opinion that even if this contract were John M. Bolan's the retained percentages, not being yet due, would not be available for him as part of his exemption in lieu of a homestead.

There is no question but that Bolan is entitled to his \$500 exemption in lieu of a homestead, and that amount should have been set off to him, as he selected, out of the funds in the German National Bank and the money due from the Gordon Engineering Company. As to the retained percentages, if when they become due it should be found that the money belongs to John M. Bolan, the defendant in error is not precluded by the judgment and finding in this case from subjecting that fund to the payment of its claim.

For the present it is sufficient to say that there should be allowed to Bolan, out of the moneys due from the Gordon Engineering Company and the German National Bank, \$500. There will remain \$33.85, which can be applied by the defendant in error upon its indebtedness.

The case cited by counsel for both plaintiff in error and defendant in error, *Haslage v. Hoover et al*, 16 C. C., 570, we think holds that where the debtor entitled to exemption in lieu of a homestead conceals money and property which he has a right to have at the time of the examination, and has other property in the custody of the court, that his concealment of property not in the custody of the court should be deemed to be an election on his part to take that property as a part of his claim in lieu of a homestead; but we do not think that case has any application to the facts developed in the case at bar.

There being no dispute as to the facts in this case we are of the opinion that a judgment should be entered in this court such as should have been entered in the court below, allowing Bolan \$500 exemption, in lieu of his homestead, out of the moneys in

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the German National Bank and due from the Gordon Engineering Company, the excess over and above \$500 to be allowed to the creditor, the defendant in error.

As to the retained percentages, under the contract for the construction of the New Richmond turnpike, the court is of the opinion that the judgment of the court below should be reversed.

Judgment accordingly.

JONES (E. H.), J., and JONES (OLIVER B.), J., concur.

**EXPLANATION BY PAROL EVIDENCE OF AN
AMBIGUOUS ENTRY.**

Court of Appeals for Hamilton County.

JAMES V. THE HOTEL HONING CO.

Decided, February 28, 1916.

*Evidence—Equivocal or Ambiguous Entry—May be Explained by
Parol Evidence—Malicious Prosecution Upon the Charge of De-
frauding an Innkeeper.*

1. In an action for malicious prosecution resulting from the arrest of plaintiff, caused by defendant, in the Municipal Court of Cincinnati, on the charge of defrauding an innkeeper, evidence was introduced by the testimony of the deputy clerk of the municipal court, who produced and identified the judge's and clerk's dockets of the municipal court, each of which showed the notation as to said case: "Dismissed for want of prosecution. Costs of warrant." The trial court refused to permit the plaintiff to answer the question: "Were you actually dismissed from that court?" *Held:* That it was error in the trial court to refuse to permit the plaintiff to testify as to the fact of his dismissal, considering the equivocal or ambiguous entry found in the journal.
2. An equivocal or ambiguous entry appearing upon the docket or journal of a court may be explained by parol evidence.

Philip & S. C. Roettinger and Harry B. Street, for plaintiff in error.

Cogan, Williams & Ragland and Horace A. Reeve, for defendant in error.

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JONES. (OLIVER B.), J.

The parties stand in this court in the same position they held in the court below. The action is one by David J. James for malicious prosecution, resulting from the arrest of plaintiff in April, 1914, caused by defendant, in the municipal court of Cincinnati, on the charge of defrauding an innkeeper.

At the close of plaintiff's testimony, the court, on motion of defendant, directed a verdict in its favor. These error proceedings are brought to secure a reversal of that judgment.

While it was said in *Fortman v. Rottier et al*, 8 Ohio St., 548, 550, that it was essential in an action for malicious prosecution that it must be shown not only that the prosecution complained of was at an end, but that "it must also appear that the plaintiff was acquitted of the charge," the later cases of *Douglas v. Allen*, 56 Ohio St., 156, and *Gaiser v. Hurleman*, 74 Ohio St., 271, 275, hold that it is sufficient to show that the prosecution was legally terminated before the commencement of the action.

The final journal entry in the case in the municipal court, which was produced in evidence, is as follows:

"This cause coming on for hearing upon the affidavit and warrant filed herein, defendant being in open court and arraigned, and after examination the court do order said defendant to pay the costs of warrant. Cost paid."

The court refused to permit the plaintiff to answer this question: "Were you actually dismissed from that court?" To this ruling plaintiff excepted and made tender of proof that plaintiff, if permitted to answer, would have stated that he was dismissed. Evidence was introduced, however, by the testimony of the deputy clerk of the municipal court, who produced and identified the judge's and clerk's dockets of the municipal court, each of which showed the notation as to said case to be: "Dismissed for want of prosecution. Costs of warrant."

Defendant below and the trial court evidently relied upon the case of *Grosse v. Oppenheimer et al*, 11 C.C.(N.S.), 374. That case was decided upon demurrer, the petition alleging "that the said cause was terminated * * * by said plaintiff being obliged to pay the costs of said prosecution," and the

court there held that such an entry must be construed to mean "that she was found guilty of the charge and fined the costs."

That case however is not identical with the instant case. Here, while the journal entry is indefinite and ambiguous as to whether the court found that the defendant was guilty or not guilty of the charge made, the explanation given by the evidence offered, especially the entries in both the judge's and clerk's dockets, shows that the defendant was dismissed. This evidence was admitted without objection or exception from the defendant, and it was competent.

"Although the usual method of proving the proceedings of a court is by record as completed and extended, it has frequently been held that the minutes or memoranda upon the *docket of the clerk* of the court or the magistrate are competent evidence of an order or proceeding in court, in case the extended record has not been made. The docket is the record, until the record is fully extended; and the same rules of verity apply to it as to the record. Every statement therein is deemed to have been made by the direction of the court." 3 Jones Commentaries on Evidence, Section 621.

See also *W., A. & G. Steam-Packet Co. v. Sickles et al*, 24 How. (65 U. S.), 333.

In the opinion of this court it was error in the trial court to refuse to permit the plaintiff to testify as to the fact of his dismissal, considering the equivocal or ambiguous entry found in the journal. It seems well settled that such an entry may be explained by parol evidence. 1 Freeman on Judgments (4th Ed.), Sections 273, 274 and 275; *Russell v. Place*, 94 U. S., 606, 608; *Leopold v. City of Chicago*, 150 Ill., 569, 574; *Lyman v. Be-cannon*, 29 Mich., 466; *Walker v. Chase*, 53 Me., 258, and *Foye v. Patch*, 132 Mass., 105.

As to the right to explain a judgment by parol evidence, see also *Parsons v. Ohio Pail Co. et al*, 6 C.C.(N.S.), 116.

The court erred in directing a verdict for the defendant, and the judgment is therefore reversed and the cause remanded for a new trial.

Judgment reversed, and cause remanded.

JONES (E. H.), J., and GORMAN, J., concur.

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**DECREE OF DIVORCE NOT CONCLUSIVE AS TO VALIDITY
OF MARRIAGE.**

Court of Appeals for Hamilton County.

PAPPALARDO ET AL. V. PAPPALARDO.

Decided, June 8, 1917.

Divorce and Alimony—Decree of Divorce Not Reviewable Nor Does Appeal Lie—Parties to an Alimony Proceeding—Not Concluded as to Validity of Marriage by Previous Decree of Divorce—Competency of Evidence as to a Former Marriage.

1. No appeal or review by error proceedings of a divorce decree can be had.
2. In the prosecution of error in a suit involving the right to alimony on the part of the wife, the parties are not concluded by a decree of divorce, previously rendered, so far as the validity of the marriage is concerned.
3. In a suit for alimony where the defendant claims that he was never legally married to the plaintiff, for the reason that he had a first wife still living at the time plaintiff claimed the marriage took place and that no divorce had been had between such first wife and the defendant, it is error to refuse to permit the defendant to testify as to his former marriage and to exclude the testimony of witnesses who were present at the church and witnessed the former wedding.

Charles Ginocchio, Jesse M. Simon and Hackett, Yeatman & Harris, for plaintiffs in error.

Joseph B. Derbes and Gideon C. Wilson, contra.

JONES (Oliver B.), J.

This is a proceeding in error in which it is sought to have this court review the judgment of the court of common pleas, division of domestic relations, granting a divorce and alimony.

Previous to the recent amendment of the Constitution, under which the jurisdiction of the court of appeals was fixed, it has consistently been held, under the different forms of the divorce statute, that no appeal or review by error proceedings of a

divorce decree could be had; and this rule was established as a matter of public policy, because of the inherent nature and effect of the decree of divorce, rather than because of the terms of the statute. *Bascom v. Bascom*, 7 Ohio (pt. 2), 125; *Laughery v. Laughery et al*, 15 Ohio, 404; *Tappan, Jr., v. Tappan*, 6 Ohio St., 64; *Parish v. Parish*, 9 Ohio St., 534, and *Mulligan v. Mulligan*, 82 Ohio St., 426.

The terms of Section 6, Article IV of the Constitution, as amended September 3, 1912, as construed by the Supreme Court in the case of *Cincinnati Polyclinic v. Balch*, 92 Ohio St., 415, broadly taken, might authorize and require a review even of a decree of divorce, as was indeed suggested in the dissenting opinion of Nichols, C. J., at page 424; but considering the uniform rule that has existed in this state up to this time we are loth to hold that such change was intended by the amendment to the Constitution, and therefore declare that in our opinion the judgment for divorce is not subject to review by this court.

The same rule, however, has not obtained with respect to a judgment for alimony, and this court in the instant case has jurisdiction to consider that part of the judgment below which related to the subject of alimony.

The amount and method of payment of the alimony allowed by the court below is not criticised by plaintiffs in error, but the contention is made that no valid marriage between the defendant in error, Louise Pappalardo, and the plaintiff in error, Joe Pappalardo, was established by the evidence, for the reason that said Joe Pappalardo had a first wife still living at the time defendant in error claimed the marriage took place, that such first wife was living at the time of the judgment below, and that no divorce had been had between her and said plaintiff in error, Joe Pappalardo.

It is however contended by the defendant in error that the question as to the marriage has been conclusively settled by the decree of divorce rendered in the court of common pleas, and that, if that decree can not be disturbed by review in this court, the parties are concluded by it so far as the validity of their marriage is concerned, upon which is predicated the right to alimony on the part of the wife.

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We are unable to grant this contention, however, because if this court is authorized to review the matter of the judgment below so far as it related to alimony, which review could in no way disturb the divorce, the judgment below must not be deemed conclusive in any way as to the right of defendant in error to secure alimony. The point contended for, as to the conclusiveness of the divorce judgment fixing the right to alimony, was raised in the case of *Cox v. Cox*, as found in 19 Ohio St., 502. The only difference between that case and the one under consideration here is that that case came into the district court from the common pleas court by appeal, while the instant case comes into this court on error. In *Cox v. Cox* the Supreme Court held that the effect of the appeal was to reopen for trial in the appellate court all the issues of fact upon which the rights of the parties with respect to alimony depended. The same rule would apply here and permit the court to review all of the issues between the parties upon which the right to alimony depends. It is not necessary, however, for this court to determine the weight of the evidence or the question as to whether or not plaintiff below might be entitled to alimony, under all the facts shown by the record, consideration being given the rule laid down in *Vanvalley v. Vanvalley*, 19 Ohio St., 588.

The record clearly discloses that the court below erred in regard to the admission of evidence, in refusing to permit the defendant Pappalardo to testify as to his former marriage, and also in refusing to admit the testimony of Angelo Zapulla and Dominick Bosca, offered to show that they were present at the church and witnessed the former wedding of Pappalardo.

In the case of *Wolverton v. State of Ohio*, 16 Ohio, 173, it was held that the admissions of the defendant to a prior marriage might be given in evidence to prove the fact of such marriage in a trial for bigamy. Birchard, C. J., on pages 177 and 178, used the following language :

“It is said on behalf of plaintiff that the ruling of the court was in conflict with the well-established rule requiring the best evidence to be produced of which the nature of the case admits, and that, by the law of the state of Michigan, records are required to be kept of all marriages, and that the prosecutor should

have been required to produce the record. Upon this theory, it would follow that the marriage could not be proved by a person present at the ceremony; and yet such proof is always admissible."

In *Miles v. United States*, 103 U. S., 304, it was held that the trial court, on an indictment for bigamy, properly admitted the declarations and admissions of the husband to prove the facts of his first marriage, and the Supreme Court approved the charge of the trial court to the effect that the declarations of the accused were evidence proper to be considered by the jury as tending to prove an actual marriage; that such marriage might be proven, like any other fact, by the admissions of the defendant or by circumstantial evidence; and that it was not necessary to prove it by witnesses who were present at the ceremony. In the opinion of the court, at page 311, it is said:

"To hold that, on an indictment for bigamy, the first marriage can only be proven by eyewitnesses of the ceremony, is to apply to this offense a rule of evidence not applicable to any other.

"The great weight of authority is adverse to the position of the plaintiff in error."

In *Umbenkower v. Labus*, 85 Ohio St., 238, which was a case involving the validity of a common-law marriage and the legitimacy of a child, it was stated at page 244 of the opinion of the court, rendered by Judge Price, that the state recognizes marriage as a civil contract, and that "it may be proved by competent parol proof and circumstances when the degree of proof is clear and satisfactory to the court or jury."

In 1 Bishop on Marriage, Divorce and Separation, Sections 1047, 1048 and 1049, the rule is laid down that it is competent to prove the fact of a marriage by the clergyman or other official person by whom it was solemnized, by the testimony of one who was present, or by either of the parties, when they are not incompetent witnesses. In Section 1050 it is stated.

"Proof by witnesses present has been deemed better than by record. Yet in law either will in any case suffice."

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The record in this case fails to show the state of the law in Italy, where defendant claimed to have been first married, in regard to the essentials of a ceremonial marriage and its record. Defendant's counsel, however, stated that they had endeavored to procure a record of the marriage, but had failed to do so because of the existing European war seriously interfering with shipping and communication with Italy, thus furnishing an excuse for their failing to obtain and produce record evidence of the marriage.

Because of these errors in regard to the admission of testimony, the judgment below, so far as it relates to the matter of alimony, must be reversed, and the cause remanded for further proceedings.

In order, however, that the plaintiff below may not fail to secure any relief to which she may ultimately be found to be entitled, the temporary restraining order against the Union Savings Bank & Trust Company will be continued, subject to the further order of the court of common pleas.

Judgment reversed, and cause remanded.

JONES (E. H.), J., and GORMAN, J., concur.

DETERMINATION OF "MARKET VALUE" OF RAILWAY STOCK.

Court of Appeals for Cuyahoga County.

THE SOCIETY FOR SAVINGS IN THE CITY OF CLEVELAND V. THE
LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY.

Decided, May, 1918.

Railways—Consolidation of Lines—Market Value of the Stock of the Company Absorbed—Ascertained from Sales, and Not by Deduction from Broad Generalizations—Section 9034.

Under the statutes relating to consolidation of railway lines, the "market value" of the stock of the company absorbed is properly ascertained by sales of stock made in good faith at any time within two years next preceding the making of the agreement of consolidation, and the value of said stock as so determined will not be set aside by a court on the plea that the true value of the stock is not shown by occasional sporadic sales, but must be determined from consideration of the value of the property owned and its earning power, together with the fact, if such be the case, that more or less of the net income has been turned back into the property instead of being distributed to the stockholders according to the usual custom.

M. B. & H. H. Johnson, for plaintiff in error.

S. H. West, contra.

GRANT, J.

Error to the court of common pleas.

In promotion of our own burden of conservancy of time and labor, we shall Hooverize what might otherwise be a tedious recitation of various things.

Having read the one hundred and eighteen pages of briefs commended to us, we assume that counsel are sufficiently informed of their case to render extended recitals here unimportant, and the matter is of no particular interest to any but the parties immediately concerned in the disposition of it.

Obeying also this law of parsimony in another respect, we pass by all discussion of the various questions of procedure tech-

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nically raised by the record. We agree with counsel that all these are merged in the main point of controversy, presently to be stated, and that with this settled, they too have no workable importance.

Addressing our inquiry then to this controlling consideration, it became the duty of the arbitrators named for the purpose to take testimony and from it to find and award to the plaintiff in error the highest market value of the stock theretofore owned by it in the defendant company at any time within the two years next preceding the consolidation; this duty was enjoined by statute.

The arbitrators accordingly proceeded to hear testimony tending, as they said, to fix and establish such highest market value within the period so limited.

The testimony so taken was confined to sales of the stock, actually made within the two year period. Of such sales of the guaranteed stock within that time there were nine in all, aggregating 205 shares, at prices ranging from \$478 (one share only) to \$460 per share—the low rate being for 14 shares.

Of the non-guaranteed stock, the sales proved were 57 in number, totalling 1787 shares; for these the highest price obtained was \$500 per share and the lowest \$461.

That these were genuine and not simulated or collusive sales, is not controverted, nor is it in dispute that they were all the sales known to have been made within the required time.

From this testimony and no other, the arbitrators found that a *prima facie* case of market value was made out, within the meaning of the statute, and called on the plaintiff in error to rebut the conclusion, if it could, by proof tending to discredit the sales actually shown. No such proof was forthcoming.

But it contended that sales alone did not and could not establish a "market value" of the stock, *prima facie*. It maintained that the sales shown were sporadic and occasional only, and that they could not be relied on in any just sense of the term to fix a "market value."

As countervailing testimony the plaintiff in error offered and suggested a much broader field of inquiry, involving the prop-

erty represented by the stock and tending, as it claimed, to establish "a fair buying and selling value, 'market value' in a broad sense, of upwards of \$1,000 a share."

It would be difficult, within reasonable limits, to particularize this entire offer to prove, but a fair intimation of what the ultimate range of it was, as well as the reason given why an inquiry based upon sales alone would be inadequate to fix a "market value" with any justice to the offerer, may be gathered from the following statement of its counsel at the hearing:

"In part, we expect to be able to show from the books of the company that the preferred stock of the Lake Shore & Michigan Southern Railway Company during the two-year period had a fair buying and selling value, 'market value' in the broad sense, of upwards of \$1,000.00 a share; that these figures are based on the property of the company and on its income, properly computed; that the New York Central & Hudson River Railroad Company owned, during the two-year period, approximately ninety per cent. of the stock of the Lake Shore & Michigan Southern Railway Company; that the policy of the New York Central management has been to turn fifty per cent. or more of the net earnings of the Lake Shore & Michigan Southern Railway Company back into the betterment of the road that the distribution of dividends to stockholders, compared with the net earnings, has been away below the usual custom of railroad companies; that the turning back of so much of the net income into the road has had a double effect, in the first place, it has lowered the selling price, in sporadic sales, of the small fraction of the stock which is scattered in the hands of the public, and, in the second place, it has increased the value of the stock; that the result is that the New York Central Railroad Company wishes to appropriate stock worth upwards of \$1,000.00 a share for \$500.00 a share; that the fact is that the stock has been so valuable that it has been an investment stock; that the only real purchasers for it have been the New York Central Railroad Company and William A. Read & Company—very likely the same thing; that there were so few sales of it as to furnish no criterion of its value; that the very fact that stock worth upwards of \$1,000.00 a share was sold in three or four instances for less than \$500.00 a share shows in itself that the stock had no market, for the doctrine that market value, in the narrow sense, fixes the limit of recovery in conversion and other cases, is predicated upon the fact that taken by and large the sale price approximates the real value.

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"It is thus evident," the brief goes on to say, "that if we could prove what we offered to prove, not only were there too few sales of any kind of Lake Shore stock to show a 'market value' proved by selling price, *but these selling prices were so abnormally depressed as to be worthless as a barometer of 'market value.'*"

But the arbitrators rejected this view altogether, and held that the extraneous considerations could have no proper place in fixing "market value," and that such value was to be referred to sales only, in the absence of fraud or collusion in making them and no claim being made that they were other than *bona fide*. We have thus presented the two theories, in substance. The record under review, notwithstanding the discursive outlook of discussion in the briefs, calls upon us only for the adoption of the one or the other of these points of view.

The bearing of the cited cases upon the narrow real question, considering the particular service which the statute requires of the arbitrators, is for the most part not very obvious, nor do they afford us much practical aid in resolving the difficulty.

We assume of course that the arbitrators are bound by the substantial rules of evidence, as courts are upon all basic and controlling points.

Going a little afield from the ordinary line of legal quotation, we find the term "market value" defined in the New International Encyclopedia, as follows:

"Market Value. The value of an article as established by public sales of such property in a particular locality. At times this value is proved by regular market quotations. It is also proved by persons familiar with the price at which such property sells regularly in the market. If the market price is abnormally enhanced or depressed at the time or place for the delivery of any goods, by wrongful combinations or by an illegal monopoly, other evidence than the market sales may be resorted to for the purpose of showing the fair value of the property in question."

Here the synonym of market value is the sales price, normally. The case at bar is not within the exception which would let in other evidence.

But a very persuasive—we may say coercive—consideration with us at the present time rests in what the Legislature itself has done to help us to a conclusion as to what it meant by “market value” when it put that term in its statute. For if we can once ascertain the legislative intent in using the words, judicial inquiry can go no further with legal propriety, no matter how strongly we may—in a proper case—feel that another meaning should be annexed to its expression.

The statute under which the arbitrators acted was passed in its present form, so far as the term “market value” is the thing required to be fixed is concerned, more than sixty years ago.

It remained in that form on the books, unchanged in this respect, for more than a generation. In 1890 it was repealed and replaced by a provision which really seems to have been framed to conform it to the line of proof offered by the plaintiff in error to the arbitrators and rejected by them. It was made to coincide, as we read it, with the exact theory propounded in this case by the offers to prove, in its essential respects and evidenced a clear legislative departure from the line of “market value” to its actual value, unless the two values should happen to be the same, and let down the bars into an unlimited field of inquiry as far as the dissenters might care to explore. Its language as to this material point was as follows:

“A stockholder who refuses to convert his stock into the stock of the consolidated company shall be paid at least the actual value of such stock, to be ascertained, not alone from its market value previous to the making of such agreement for consolidation by the directors, but from a consideration of the earning capacity of the road, in which such stock is held without reference to such proposed consolidation, the condition of said road, betterments, cars and other property, its existing connections, and any other facts tending to increase or diminish the value of the stock, such payment to be made before the consolidation takes effect.”

This, it will be seen, was a veritable letter of marque, a roving commission to privateers, to sail the high seas from Wall street

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to the "off again, on again, gone again" of Flanigan at the switch shanty.

If such were the statute now, it would be conclusive in its support of the plaintiff's contention. This replacing enactment seems on its face to be an impracticable and wholly unworkable thing. It undertook to furnish a test of value which may overnight so fluctuate as to shift the estimate by hundreds of thousands of dollars. A thunder storm coming up while the arbitrators were making up their award, might disastrously affect "the condition of said road," a fire in the sheds might, in the same time, materially reduce the "betterments, cars and other property;" all "existing connections" would have to be, at the peril of the inquirer, inquired into in their remotest ramifications and to their consequences by possibility. And the "any other facts" provision would inevitably make the inquiry endless and interminable and bring up at last at a place which, as I recollect, is somewhere on the line of this very consolidated road—to-wit: Point No Point. But it admirably fulfilled the conditions on which the theory of the offered testimony and line of inquiry was bottomed.

The actual work-out covered only a couple of years.

The provision last quoted was repealed by the act of 1892, which restored the thing to be found by the arbitrators to the "market value" of the statute of 1856, pure and simple, untangled from the test of actual value allowably to be established by the considerations in that behalf annexed by the statute as it was amended in 1890. By the exclusion from the law as it was when the arbitration was had, of the tests allowed by the repealed act, as tending to fix actual value, aside from "market value"; by this restoration of the ancient landmark, we think the Legislature must have acted advisedly and with some end in view. To our apprehension that purpose was to clear the field of inquiry from the particular tests and standards which were in the act of 1890 but were omitted in the law of 1892. This, in our estimation, fairly repels the idea that these particular tests may be read into the statute after having been taken out of it, and, so interpolated, be pressed into the service of proving what "mar-

ket value" is. If such was the purpose, then the Legislature deliberately threw overboard a plain rule and substituted a doubtful one for it. Such an outcome of legislative scrutiny is not to be presumed.

Our opinion is that the arbitrators, in holding that the sales proven to them, in good faith made, were evidence from which a "market value" of the stock might be established, and in rejecting the enlarged scope of inquiry proposed to them, but followed the plain requirement of the statute and the intent of the Legislature in enacting it. We can think of no other conclusion which would satisfy the statute and yet do no perceived violence to a just determination of the duty laid upon them by it.

This conclusion of what we must regard as the last legislative expression of the intent and purpose of the statute, to abandon the theory of the case held by the plaintiff in error here, is not materially at variance with, or shaken by, any of the authorities brought forward in the briefs and arguments at the bar, so far as these are in point at all. On the contrary, so far as they are applicable, they seem to us to fortify and support it.

That this consideration of what the Legislature meant in bringing the statute back to its rule of first instance after a trial of the opposite rule, was influential in shaping the decision of the arbitrators to hold evidence of actual sales sufficient to establish "market value," and to reject testimony reaching beyond that, is most likely. And in so basing their finding that they were right, we are equally without doubt. If they were, this consideration settles the whole case for us.

Of course in one hundred and eighteen pages of briefs and two hours of oral argument at the bar, a great deal more than this has been said. But that anything else has been said, really to the purpose, or need be said, is in our opinion extremely doubtful.

We say this to show why no more particular attention is paid to the many, very many, questions urged upon us, but which are, as we think, all contained, in substance, in what has already been said.

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We can think of no more satisfactory way of eliciting the truth as to what was the market value of the stock, than that adopted by the arbitrators. If they had entered the fields of controversy proposed to them by the offers to prove, it would, we think, have been at the risk of obscuring and not clearing a correct vision of their one duty. For example, the statement found on pages 44 and 45 of the brief is as follows:

"To show the court, however, that our claims are not without foundation and that we reasonably believe that if opportunity be given we can clearly prove the stock to be of a fair value—market value in the broad sense—of upwards of one thousand dollars (\$1,000.00) a share, we may add that the *Wall Street Journal*, the financial organ of the railroads and other large interests in New York City, has said that the stock of The Lake Shore & Michigan Southern Railway Company was worth one thousand dollars (\$1,000) a share."

It is thought by some uncharitable people that the *Wall Street Journal* not only "has said," but is in the habit of saying, a great many things besides its prayers, but surely men charged with a duty of fixing values and whose time is worth something, can not be expected to spend it in listening to that kind of first aid to reach a just and reliable conclusion. It is indeed a question, we think, whether the adoption of the offer would have been effectual either in the "broad sense" ostensibly sought, or in the broad cents really struggled for.

Although there are several assigned grounds of error before us, the foregoing intimations it is believed dispose of the substance of them all.

We find none of them to be of controlling merit towards disturbing the action of the arbitrators or the consequent judgment under review. In our opinion that judgment in each case, does substantial justice between the parties to it.

It is, therefore, affirmed.

DUNLAP, J., and LIEGHLEY, J., concur.

REFORMATION OF A FIRE INSURANCE POLICY.

Court of Appeals for Hamilton County.

THE R. K. LEBLOND MACHINE TOOL CO. v. THE HUMBOLDT
FIRE INSURANCE CO.*

Decided, June 29, 1914.

Reformation of Written Contract—Made to Correspond With the Intention of the Parties—Description of Property Covered by a Policy of Fire Insurance Corrected.

1. Where the meaning of a written instrument is not clear, it will be construed most strongly against the person who prepared it.
2. Where through mistake, fraud or inadvertence, the agent of an insurance company failed to insert in a policy of fire insurance a proper description of the location of the risk, a court will reform the policy in such a way as to make the description correspond with the intention of the parties.

Robert A. LeBlond, for plaintiff in error.

J. L. Kohl, contra.

JONES (E. H.), J.

Plaintiff in error, who was plaintiff below, brought suit on a certain policy of fire insurance issued by the defendant company. The issues were made upon the plaintiff's fourth amended petition, which alleged that the defendant, by the policies of insurance referred to, insured the plaintiff against loss and damage by fire to the amount of \$400 on live patterns, etc., "all while contained in the building occupied by the Mowry Car Wheel Works Company, situated at the southeast corner of Eastern avenue and Lewis street, Cincinnati, Ohio." It is then alleged that the patterns of the plaintiff on the premises of the Mowry Car Wheel Works Company were stored in two separate buildings at the time the policy was issued, which fact, it is alleged, was known to the defendant's agent; that the intention of the par-

*Affirmed, *Humboldt Fire Insurance Co. v. LeBlond Machine Tool Co.*, 96 Ohio State, 442.

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ties was that the said property should be covered while located and contained not only in the building at the corner of Eastern avenue and Lewis street, but also while located and contained in the other building on the premises of the Mowry Company; and that by mistake, fraud or inadvertence the agent of the defendant company failed to include both buildings in the description of the location of the risk.

The reformation of the policy, so that the same will stipulate for insurance on the property referred to while located and contained on the premises of the Mowry Company at the southeast corner of Eastern avenue and Lewis street, Cincinnati, Ohio, is prayed for, and that after reformation is ordered plaintiff be given judgment against said defendant in the sum of \$400.

The total amount of insurance on these patterns, etc., at this time, was \$2,400, which was divided among different companies who issued separate policies in amounts of about \$400 each. It appears from the evidence in this case that at the time these policies were issued, and at all times since, the patterns had been left in the custody of the Mowry Car Wheel Works Company by the plaintiff, and that about nine-tenths of the patterns were stored in the frame building which burned, and which stood a few feet away from the brick building immediately upon the corner of the two streets named.

Mr. Dillaby, a stockholder and a frequent visitor at the car wheel company's plant, was at the time engaged in the insurance business, and undertook at the request of the superintendent to obtain insurance upon said patterns, which said superintendent had been requested by the plaintiff company to secure.

We think that there is satisfactory evidence that Mr. Dillaby knew that the great bulk of these patterns were stored in the frame building, and it was unquestionably his duty and the duty of the agents of the defendant company who wrote this policy to know what it covered and where the property was located. In the absence of evidence to the contrary the company through its agents must be presumed to have known where the patterns were. The building which was destroyed, or at least a portion thereof, had been for at least thirty years, and possibly for fifty years,

used exclusively for the storage of patterns. It is true that in late years some few patterns were stored in the brick building at the corner, which, according to the claim of the defendant in error, is the only building described or contemplated in the policy. In this connection see Richards on Insurance (2d Ed.), page 53, paragraph 6 of Section 43, which reads:

“The contract of insurance having been framed by the insurers in their interest, and the insured being compelled to accept the form offered in order to secure insurance, any ambiguity as to the intent or meaning of its terms, or what properly was intended to be covered, or where situated, will be construed in favor of the insured, and with the purpose of granting him an indemnity for his loss.”

This policy was written and executed by the insurance company and by it delivered to the insured, or rather to the Mowry Car Wheel Works Company for the insured. It is a familiar rule of construction that an instrument will be construed, where its meaning is not clear, most strongly against the person who prepared it. This rule of construction, coupled with the presumption of knowledge as to the location of the patterns on the part of the defendant company, makes it appear to the court that there should be a reformation of said policy and that the court below erred in instructing a verdict for the defendant. We think that the instruction was prejudicial to the rights of plaintiff in error, and that substantial justice has not been done.

For these reasons the judgment is reversed, and the cause remanded for further proceedings.

Judgment reversed, and cause remanded.

SWING, J., and JONES (Oliver B.), J., concur.

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DAMAGES FOR CHANGE OF GRADE.

Court of Appeals for Butler County.

THE CITY OF MIDDLETOWN V. DOTY.

Decided, January 13, 1917.

Streets—Damage to Property Claimed Because of Grading for Construction of Sidewalk—No Liability Against the City, When.

In an action against a municipality for damages for change of grade in a street, the plaintiff must show either that his buildings were constructed in accordance with a grade regularly established, either by ordinance or user, and that the improvement of the street had been made to a different grade and damages caused thereby; or that while no grade was then established, the buildings were originally erected to conform to what would be a reasonable grade for the unimproved street when it should be improved, and that instead of establishing such reasonable grade the city authorities had adopted one entirely unreasonable.

W. G. Palmer, for plaintiff in error.
Andrews & Andrews, contra.

JONES (OLIVER B.), J.

This proceeding in error is brought to reverse the judgment of the court of common pleas in favor of Charles G. Doty, plaintiff below and defendant in error here, for damages to his property caused by the grading and construction of sidewalks on Bellemonte avenue in front of same.

The amended petition alleged that prior to the improvements put upon said lot Bellemonte avenue had an established grade, which was a reasonable grade and afforded reasonable access to said lots, and that after the grade was established and so existed the streets were improved with reference to the grade then existing; that the city has changed the grade of this street so that the grade in front of plaintiff's property has been lowered about 8 feet; that plaintiff's dwelling is about 14 feet

from the sidewalk line of the street, and that in cutting down the street the ingress and egress of plaintiff's property is greatly interfered with, making it necessary for plaintiff to construct steps and retaining walls, or to grade and rearrange said property.

The city as defendant denied that, prior to the improvements upon the lots of plaintiff, Bellemonte avenue had an established grade or that the lots were improved with reference to that grade, and averred that the buildings and improvements of plaintiff were made before any grade whatever had been established by the city of Middletown, and were made without reference to a reasonable grade for Bellemonte avenue, and that by the use of ordinary care plaintiff or his grantor could have anticipated the grade which has since been established. The city further averred that the established grade of Bellemonte avenue is a reasonable and proper one, and necessary for its proper use as a public street of said city.

These averments were denied by plaintiff in his reply.

The evidence shows that Bellemonte avenue is a street but two squares long, extending from Third street to North street; that the dwelling house on plaintiff's lot was built and other improvements made in the year 1908, the house being opposite the end of Second street, which terminated at Bellemonte avenue; that at that time Bellemonte avenue was simply a platted and dedicated street upon land which had not been graded but was at the time fenced and temporarily used as a pasture; and that no grade had been fixed by user because no public travel passed over same.

By ordinance passed in 1910 the city established the first grade for Bellemonte avenue, and, subsequently, in 1915, two ordinances were passed by the city authorities establishing a grade for the east curb and for the west curb, respectively. Both of the grades established by these ordinances provided for a descending grade from the level of Third street, at its intersection with Bellemonte avenue, to the level of North street, at its intersection. There was in front of plaintiff's property a change, by the second ordinance of less than six

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inches; and no improvements were made to conform to said first grade of 1910, nor were any improvements made between the passage of the first grade-ordinance and the second grade-ordinance.

The evidence of Charles Goldman, plaintiff's grantor, who built the house, shows that he made no application to the city for the establishment of a grade for Bellemonte avenue at the time of building, and that he located the house at the particular place at which it was built because he regarded it as a beautiful site for a home, having the outlook at the head of Second street. There is nothing in the record to show that there was any effort to anticipate the reasonable grade at which Bellemonte avenue would be improved, nor does the record contain any evidence showing that the grade established by the city, upon which improvements have been made, is in any way unreasonable. The record also fails to show that any claim for damages was filed by plaintiff under the provisions of either Section 3823 or Section 3830 of the General Code.

As is well known, the law of Ohio, in compensating property owners for damages to improvements caused by change of grade, or by the establishment of an unreasonable grade in the construction of streets, is different from that of most of the states of the Union, in that it is deemed inequitable to permit the whole burden to fall upon the owner of property, which has been improved with reference to an established grade, rather than to have it borne by the public which is benefited by the new grade. The rule in Ohio is well stated in the syllabus in *The City of Akron v. The Chamberlain Co.*, 34 Ohio St., 328, as follows:

"The owner of a lot abutting on an unimproved street of a city or village, in erecting buildings thereon, assumes the risk of all damage which may result from the subsequent grading and improvement of the street by the municipal authorities, if made within the reasonable exercise of their power.

"The liability of a municipality for injury to buildings on abutting lots exists only where such buildings were erected with reference to a grade actually established, either by ordinance or such improvement of the street as fairly indicated

that the grade was permanently fixed, and the damage resulting from a change of such grade, or, where the buildings, if erected before a grade was so established, were injured by the subsequent establishment of an unreasonable grade.

"Whether a grade be unreasonable or not, must be determined by the circumstances existing at the time the grade was established, and not by the circumstances existing at the time abutting lots may have been improved."

If plaintiff had been able to show that his buildings were constructed in accordance with a grade regularly established, either by ordinance or by user, and that the improvement of the street had been made to a different grade, and damages caused thereby, he would be entitled to recover such damages; or if he had shown that while no grade was then established the buildings were originally erected to conform to what would be a reasonable grade for the unimproved street when it should be improved, and that instead of establishing such reasonable grade the city authorities had adopted one entirely unreasonable, then he might have recovered. As stated by Judge McIlvaine, in *The City of Akron v. The Chamberlain Co.*, *supra*, in the opinion of the court, at page 335:

"Whatever latitude there may be in the exercise of discretion in fixing the grade of a street is lodged in the municipal authorities, and not in the adjacent lot-owners."

In other words, the duty of establishing the grade rests primarily with the municipal authorities, and the city can only be held for an unreasonable grade when they have failed to perform that duty and made the grade so unreasonable as to amount to an abuse of discretion. Plaintiff failed to produce any witnesses to show such abuse of discretion in this case. The only evidence as to the reasonableness of the grade came from witnesses produced by the defendant, and there is nothing to show that the grade to which Bellemonte avenue is improved could be considered an unreasonable grade.

The verdict of the jury and the judgment of the court below is contrary to the evidence and to the law. The judgment is

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therefore reversed and the cause remanded for such further proceedings as are authorized by law.

Judgment reversed.

JONES (E. H.), J., and GORMAN, J.. concur.

IMPROVEMENT OF SIDEWALKS.

Court of Appeals for Hamilton County.

THOMPSON ET AL V. CITY OF CINCINNATI ET AL.

Decided, April 5, 1915.

Sidewalks—Improvement of—Power so to do Vested in the City Council—Necessity for—Court of Equity May Intervene to Prevent Arbitrary Action.

The power to determine when it is necessary to improve or repair a sidewalk is vested in the council of a city, but this power can not be exercised in an arbitrary manner regardless of the public necessity or the rights of the property owners. A court of equity will intervene to prevent arbitrary action amounting to a manifest abuse of discretion.

W. W. Clippinger, for plaintiff.

W. M. Schoenle, City Solicitor, and *Saul Zielonka*, Assistant City Solicitor, for defendant.

JONES (OLIVER B.), J.

The law announced by this court in *Livingston v. City of Cincinnati*, 22 C.C.(N.S.), 383, 4 Ohio App., 338, is applicable to this case. The power to determine when it is necessary to improve or repair a sidewalk is vested in the council of the city. But this power can not be exercised in an arbitrary manner, regardless of the public necessity or the rights of the property owners. A court of equity will only intervene to prevent such arbitrary action amounting to a manifest abuse of discretion.

The evidence shows that the brick sidewalk described in the petition, having a frontage of 250 feet on the north side of Eighth street, between Depot street and State avenue, is out of repair in the following particulars: that, commencing 18 or 19 feet from the west end, and running 20 feet or more in length in front of the property described as a carpenter shop, it is in bad condition, the bricks being entirely missing one-third of the width of the sidewalk, and the other two-thirds of the width being of a rough and uneven surface containing a two-inch depression and projecting bricks, which portion should be replaced with a new sidewalk; that the center of the sidewalk just east of this front for a distance of about 40 feet is rough, which should be so relaid as to be smooth and even; and that four certain depressions or valleys are shown, varying from one to two and a half inches deep, extending from the curb eight to ten feet across the sidewalk, at stop-boxes, being evidently where trenches have been dug for water or gas service pipes which have not been properly filled and tamped when repaved, which depressions should be filled and repaved. Other slight defects are indicated by the evidence, especially the evidence of City Sidewalk Engineer Barr and by the plan or blueprint submitted. With the exception of the sidewalk in front of the carpenter shop above referred to, where a new sidewalk should be constructed, the remainder of the sidewalk is in good condition, favorably corresponding with the brick sidewalks laid in that portion of the city, and answering all the needs of public travel. The defects above pointed out are of minor importance and can all be remedied by comparatively inexpensive repairs, which should be made by the property owner under the supervision of the city.

Plaintiffs should be permitted to repair all of that part of the sidewalk except that portion lying in front of the carpenter shop, where a new sidewalk should be built. Under the circumstances shown, the court find that it would be an abuse of discretion for the city to require the destruction of the entire brick sidewalk and its replacement by a cement sidewalk at the cost of the property owners.

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Attention is called by the city in its evidence to the fact that certain stop-boxes situated in this sidewalk near the curb are above the grade and the surface of the sidewalk, and that several drains from the yard empty upon the surface of the sidewalk. Neither of these complaints would be rectified by changing the sidewalk from brick to cement. If they are contrary to the legal requirements of the city, proper steps may be taken for their correction, but they are not involved in the sidewalk order here under consideration.

An injunction will be granted as above indicated.

Injunction allowed.

JONES (E. H.), J., and GORMAN, J., concur.

PURPOSE AND EFFECT OF THE CARMACK AMENDMENT.

Court of Appeals for Ross County.

NORFOLK & WESTERN RAILWAY CO. v. NELSON DRESBACH AND
THE CLEVELAND, CINCINNATI, CHICAGO & ST.
LOUIS RAILWAY CO.

Decided, April 4, 1917.

Carriers—Goods Lost in Transit—Effect of the Remedy Against the Initial Carrier under the Carmack Amendment—Action Under this Amendment May be Prosecuted Against the Initial Carrier Only.

1. In an action against an initial and connecting carrier for the loss of goods in transit, such action being based upon their common law liability and sounding in tort, no recovery may be had against the initial carrier by reason of the provisions of the Carmack amendment of Section 20 of the Federal act to regulate commerce.
2. The remedy against the initial carrier, provided by this section and Section 8994-1 of the General Code, may be prosecuted only against the initial carrier, and in such action a connecting carrier or carriers is neither a necessary nor proper party.
3. While this section is intended to provide the shipper with a special remedy against the initial carrier, thereby relieving him from the

necessity of actually locating the carrier or carriers by whose negligence he sustained his loss, yet it also saves to him all his common law rights and remedies against all carriers, but he may not prosecute both remedies under one cause of action.

Bannon & Bannon and *Lyle S. Evans*, for plaintiff in error.
J. D. Withgott, for Nelson Dresbach.
Fred C. Rector, for Big Four Company.

MIDDLETON, J.

This action was instituted by the defendant in error, Nelson Dresbach, against the plaintiff in error, Norfolk & Western Railway Co., and the Cleveland, Cincinnati, Chicago & St. Louis Railway Co., which will hereinafter be designated as the Big Four, to recover damages alleged to have been sustained by reason of the negligence of the defendants in not properly carrying and handling two car loads of hogs shipped by the plaintiff over the lines of said defendants.

The petition alleges that plaintiff delivered said hogs to the defendant, Norfolk & Western Railway Company, at the village of Kingston, Ohio, to be transported to Buffalo, New York, and that said defendant company thereupon delivered to plaintiff its written agreement to so carry said hogs to said destination. It alleges further that said defendant, the Big Four Company, received said hogs at Columbus, Ohio, subject to the agreement entered into by the defendant, Norfolk & Western Railway Company. It alleges further that said defendants did not carry said hogs safely and were negligent and careless, and permitted said cars of hogs at points along the lines of said companies to stand without attention or water for several hours and to be unnecessarily delayed in transportation, etc.

It is apparent from this petition that the plaintiff below, Nelson Dresbach, launched his case against the defendant companies upon the theory that they were joint tort-feasors and that the combined negligence of both was the proximate cause of the injury sustained by him. A careful review of the facts set up in the petition admits of no other inference or conclusion. Manifestly, the action was not brought against the initial carrier un-

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der its liability as defined by what is known as the Carmack amendment of Section 20 of the Act to Regulate Commerce, because in an action against the initial carrier under said amendment the connecting carrier is neither a necessary or proper party and if joined with the initial carrier the petition would be subject to a special demurrer upon the ground of misjoinder of parties defendant. So that the action as originally instituted must be treated as an action to enforce the common law liability of both carriers, which liability may be joint or several as the evidence may disclose.

Both defendant companies filed answers setting up substantially the same defense, with the exception that the Big Four Company in an amendment to its answer pleads a failure of the Norfolk & Western Railway Company to notify it of the shipment of said hogs so that it could promptly transport them from Columbus and, if necessary, hold a train for that purpose.

After the jury was impaneled and the case had proceeded to trial the court sustained a motion to dismiss the Big Four Company upon the ground that it had not been notified of the claim of plaintiff within thirty days, as required by the terms of the contract with the initial carrier, or Norfolk & Western Railway Company. The dismissal of the Big Four Company is one of the grounds of error now urged by the Norfolk & Western Railway Company. After the dismissal of said defendant company the case proceeded against the one defendant, Norfolk & Western Railway Company, and resulted in a verdict in favor of plaintiff. The jury also returned a special verdict, in which it found that the loss and damages complained of in the petition were sustained upon the line of the Big Four Company.

Various errors are assigned for the reversal of this judgment, to which, for the purposes of this decision, it will not be necessary to refer in detail.

Coming direct to what we consider to be the controlling question as shown by the record it becomes necessary to examine Section 20 of the commerce act aforesaid to determine whether said section has any application to or connection with this action under the pleadings. That section as amended is the same as

Section 8994-1 of the General Code of Ohio and provides as follows:

"That any common carrier, railroad, or transportation company, receiving property for transportation from a point in one state to a point in another state, shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

"That the common carrier, railroad or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad or transportation company on whose line the loss, damage, or injury shall have been sustained, the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

Plaintiff in error contends that the dismissal of its co-defendant is in effect an adjudication of the latter's liability, and that such dismissal deprives the former of its right of action to recover from its co-defendant the loss or damage it has sustained by reason of this judgment, because the jury has found that the loss to the shipper occurred on the line of said Big Four Company. It contends further that the court erred in dismissing said Big Four Company from the case because while the contract between the Norfolk & Western Railway Company and the shipper provides that no common carrier shall be liable for any loss sustained upon its line unless such carrier is notified as required by the terms of said contract in respect to the notification of the initial carrier, yet in as much as the initial carrier was notified of such claim that notice to it is notice to the connecting carrier because the latter was the agent of the former in the transportation of said hogs. In support of this contention the court is cited to the case of *Railway Co. v. Wall*, 241 U. S., 87, in

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which it is held that notice to the connecting carrier is notice to the initial carrier.

We are not impressed with either of the foregoing contentions of the plaintiff in error. We do not think that the dismissal of the Big Four Company, for the reasons named in the entry of said dismissal, is a final adjudication of its liability to the initial carrier, if such liability exists; and as to the second contention, while notice to the initial carrier may be notice to the connecting carrier in all matters within the scope of the latter's agency, yet when the liability of the connecting carrier is a several liability and depends upon facts wholly independent of its agency and its relation to the initial carrier such a rule may not obtain, and that is precisely the situation here. The initial carrier has written this provision into its contract. It has placed it there for the protection of the connecting carrier, not as a protection to the connecting carrier as its agent, but as a protection to the connecting carrier against the latter's separate and independent liability to the shipper growing out of acts wholly disconnected with its responsibility to the initial carrier. It would seem that such a provision in the contract was wholly unnecessary and in reality one against the interests of the initial carrier, but it is there by the act of the initial carrier alone and it ought not complain of results that may not be as favorable to it as it anticipated when it placed this condition in the contract.

We have, however, in this connection, another question of much more serious import as regards the interests of plaintiff in error.

When the court dismissed the Big Four Company such dismissal did not thereby change the nature of the action. It still remained a suit to enforce the common law liability of the Norfolk & Western Railway Company. The dismissal of the Big Four Company, under the circumstances, could not and did not change in any respect the character of the suit. The only effect of this dismissal was to relieve the Big Four Company from any liability and to confine the plaintiff entirely to his right of action against the Norfolk & Western Railway Company under its common law liability as fixed and determined by its contract with the plaintiff.

While there has been much confusion and some conflict in the construction placed on Section 20 of the commerce act aforesaid, it now appears to be the settled law that the provision of this section, whereby the shipper or holder of any receipt or bill of lading shall not be deprived of any remedy or right of action which he has under existing law, authorizes him to sue any one or all of the carriers whose negligence, joint or several, resulted in any loss or goods in transit on their respective lines. While this section is intended to provide the shipper with a right of action against the initial carrier, thereby relieving him from the task of actually locating the carrier whose negligence caused the loss, yet if he does not desire to pursue this remedy which, as before observed, is one against the initial carrier alone, and if he knows which carrier or carriers caused the injury he may sue it or them. *Bichlmier v. Railway Co.*, 150 N. W., 508, *Elliott v. Railway Co.*, 150 N. W., 777.

When a statute gives a remedy where one already exists at common law the statutory remedy is considered merely cumulative, and a party may sue at common law as well as upon the statute. *Ency. Pl. & Pr.*, Vol. 20, p. 603. But both remedies may not be prosecuted together under one cause of action. *Com. Dig., Action upon Statutes, C.*

So in this case, as before observed, the defendant in error, Nelson Dresbach, having elected to pursue his common law remedies against said defendant companies, must be held to the law applying to the cause of action so selected by him.

The learned court in its general charge to the jury, after quoting Section 20 aforesaid, proceeded to instruct the jury to the effect that, if they found the loss was caused by the negligence of the Big Four Company, they could nevertheless return a verdict against the Norfolk & Western Railway Company under its liability as an initial carrier as fixed by this section. We think this instruction was erroneous and not applicable to the case under plaintiff's petition. When the Big Four Company was dismissed it did not change the character of the action. The plaintiff shipper could not then be heard to say that the Norfolk & Western Railway Company was liable to him as an

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initial carrier, because no cause of action against it as an initial carrier was pleaded in his petition. After the dismissal of the Big Four Company the plaintiff was compelled to establish the fact that the Norfolk & Western Railway Company by its negligence, or its negligence combined with that of the other company, caused his loss. If the evidence did not disclose either one or the other state of facts he could have no recovery under his petition against the Norfolk & Western Railway Company. If the negligence of the Big Four Company alone was the proximate cause of the injury, under plaintiff's petition the Norfolk & Western Railway Company could not be held liable for his loss. We are, therefore, of the opinion that the instruction of the court aforesaid was highly prejudicial to plaintiff in error, and for this reason alone the judgment of that court must be reversed.

The judgment of the court of common pleas will be reversed and the cause remanded to that court for a new trial.

SAYRE, J., and WALTERS, J., concur.

EMPLOYEE INJURED IN A CHAIN-DRIVEN AUTOMOBILE TRUCK.

Court of Appeals for Hamilton County.

FARRELL V. THE ROCHE-BRUNER BUILDING CO.

Decided, June 21, 1915.

Negligence—Employee Riding on Motor Truck—Has Foot Crushed in Sprocket Wheel—Proximate Cause of Injury.

Plaintiff was employed by defendant in loading brick upon an automobile truck at one point and unloading same at another point, and with other men similarly engaged was permitted to ride on the truck. While so riding he sat with his feet hanging over the side and directly over the sprocket wheel and chain by which the truck was propelled. The truck was driven near an approaching wagon,

and, fearing for his safety, plaintiff instinctively drew back his leg, which was thereby caught in the sprocket and chain and crushed so that amputation was necessary. The evidence showed that seventy per cent. of all automobile trucks are chain driven, and that the sprocket and chain are in all makes exposed and uncovered. Plaintiff had a choice of position upon the truck and there was ample opportunity for him to have placed himself where he would have been in no danger whatever from the sprocket wheel and chain. *Held*: That no negligence can be attributed to defendant from the use of such chain-driven automobile truck, and that the proximate cause of the plaintiff's injury was his own act in placing himself upon the truck at such point as to be in danger.

Shuey & Anderson, for plaintiff in error.

Robertson & Buchwalter and *Theodore C. Jung*, contra.

JONES (Oliver B.), J.

Plaintiff, Charles Farrell, was in the employ of the defendant and was engaged in loading brick upon an automobile truck at the railroad yards and unloading same from the truck at a building which was being constructed by defendant on Main street in the city of Cincinnati. He and other men engaged in the same task were permitted to ride on the truck from the building to the railroad yards, and while so riding, at the time of the injury, March 17, 1913, he sat upon the side of the truck with his feet hanging over the side directly over the sprocket wheel and chain by which said truck was propelled, other men sitting on either side of him. When the truck arrived at the railroad yards it was driven within a few feet of an approaching wagon, and plaintiff, fearing for his safety, instinctively drew back his leg, which was thus caught in the sprocket and chain and was crushed so that amputation was necessary.

The defendant at the time employed more than five workmen in the same line of business, and had not then availed itself of the protection of the workmen's compensation law.

At the close of the evidence, the court, upon motion of defendant, directed the jury to return a verdict for the defendant, upon which a judgment was entered; and error proceedings are here prosecuted to set aside that judgment.

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Two grounds of negligence were alleged in plaintiff's petition:

1. That the defendant "negligently and carelessly permitted and suffered the said sprocket and chain on said automobile to remain exposed and uncovered."

2. That the defendant "negligently and carelessly ran and moved said automobile truck dangerously close to a passing wagon, and that plaintiff reasonably anticipated bodily injury from collision from said wagon and sought to withdraw himself from said apparent danger, that in so doing his leg became entangled in said sprocket and chain."

The bill of exceptions does not purport to contain all the evidence, but on the contrary it is certified that it is a "narrative form of the evidence produced by the parties and heard by the court on the question of negligence and the injury." The evidence in the bill of exceptions, however, shows that 70 per cent. of all truck automobiles known to the business are chain driven, and that the sprocket and chain in all makes are exposed and uncovered.

It appears also that the sprocket and chain are in a measure protected by the wheels and the edge or bed of the truck. These trucks are made for the purpose of hauling freight, and it is not intended that people riding upon them should extend their legs down over the side in the vicinity of the sprocket and chain.

It appears in this case that plaintiff had a choice of position upon the truck and there was ample opportunity for him to have placed himself where he would have been in no danger whatever from the sprocket wheel and chain. Had he so placed himself, no injury could have resulted from his fear of contact with the passing wagon, and there would have been no reason for his thrusting his leg in contact with the chain and sprocket, because of fear of such collision.

It therefore appears that no negligence can be attributed to defendant from the use of such chain-driven automobile truck, and that the proximate cause of the plaintiff's injury was his own act in placing himself upon the truck at such point as to be in danger.

Error is urged, on the part of the plaintiff, in the court's refusal to allow him to prove that "a cotter pin in the sprocket wheel had been lost and defendant had replaced it with a wire, which extended some distance beyond the axle."

The refusal to admit such testimony is shown in the bill of exceptions, as follows:

"The court sustained the objection for the reason that there was no allegation in the petition as to any negligence on account of a defective construction or condition of the sprocket wheel except that it was exposed, and the court offered to allow the plaintiff to amend his petition, which the plaintiff refused to do."

A careful consideration of the petition shows that the trial court was correct in its statement that no allegations of defective construction or condition of the sprocket wheel appeared in the petition, and plaintiff, having refused to avail himself of the opportunity offered by the court to amend his petition in that respect, can not now be heard to complain of the refusal to receive such testimony.

The second defense of the answer of defendant set up a payment in full and a settlement and a release in bar by the plaintiff. There is nothing in the bill of exceptions to show what evidence was introduced in that respect, and, under the presumption in favor of the ruling of the trial court, it must be held that a directed verdict was justified under that defense.

The court finding no prejudicial error, the judgment below is affirmed.

JONES (E. H.), J., and GORMAN, J., concur.

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**AUTHORITY OF THE PROBATE COURT TO TRY THE
RIGHT OF PROPERTY.**

Court of Appeals for Cuyahoga County.

JENNIE TIBBOTT, ADMINISTRATRIX OF THE ESTATE OF JAMES REES,
DECEASED, v. MRS. FRANCES CADISCH.*

Decided, March 27, 1916.

*Right of Property—Probate Court Has Authority to Determine—Title
Thus Settled is Res Judicata in Another Court.*

The statutes of Ohio, as they now stand, provide for trial of the right of property by the probate court, and proceedings before that court pursuant thereto may be pleaded in bar of an action in another court to try the title to or the right of possession of the property involved in said proceedings.

Kerruish, Kerruish, Hartshorne & Spooner and E. J. Cherney,
for plaintiff in error.

R. J. Selzer, contra.

MEALS, J.

Error to the court of common pleas.

On the 20th day of January, 1915, the plaintiff in error instituted proceedings in replevin against the defendant in error in the Municipal Court of Cleveland for recovery of certain personal property, to-wit, one diamond ring, one diamond stick pin, and sixty dollars in currency. Thereupon summons was duly issued by the clerk of the municipal court and placed in the hands of a deputy bailiff of said court for service. On the 22d day of January, 1915, said bailiff returned said summons endorsed as follows:

“Received this writ January 20, 1915, and by virtue thereof I searched for the chattel property within described but failed to find the same. I served this writ on the within named de-

*Motion to certify the record in this case overruled by the Supreme Court May 18, 1916.

fendant, Mrs. John Cadisch, whose real name I found to be Frances, by delivering to her a true and certified copy thereof, with all endorsements thereon. Charles L. Selzer, bailiff, by Ed E. Peck, deputy bailiff."

During the pendency of said action in the municipal court, to-wit, on the 22d day of January, 1915, the plaintiff in error duly instituted in the Probate Court of Cuyahoga County proceedings charging the defendant in error with concealing, withholding and appropriating property to her own use in fraud of the rights of the administratrix and others interested in the estate of James Rees, deceased. Summons was duly issued and served.

On the 27th day of January, 1915, during the pendency of said replevin action in the municipal court, and without objection, a trial was had in the Probate Court of Cuyahoga County before the Honorable Alexander Hadden, judge of said court, on the merits of said complaint, and the judgment of said court—a jury having been waived—was entered for the defendant in said proceeding, the defendant in error in this action.

On the 5th day of February, 1915, a trial of said replevin action was had in the municipal court. At said trial the defendant in error offered in evidence the original papers and a certified copy of the docket entries of the proceedings had in the probate court, in support of a plea in bar to said action. This evidence was excluded by the court, and the trial resulted in a judgment for the plaintiff in error. This judgment was reversed by the court of common pleas. Error is prosecuted in this court to reverse the judgment of the court of common pleas.

One question only is presented for our consideration: Did the proceedings in the probate court constitute a trial of the right of property? If so, it is admitted that the municipal court erred in excluding the evidence offered of said proceedings in the probate court.

The act of February 26, 1843, supplementary to the act for the settlement of estates of deceased persons, provided that "upon complaint of an executor or administrator before the probate court against any person suspected of having concealed,

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embezzled or carried away the property or effects of the estate, the parties suspected shall be cited to appear before the court and submit to an examination touching the matter of complaint." It also provided that either party might examine witnesses and required the court to reduce all such examinations to writing, to be signed by the parties and witnesses respectively, and file the same in the court. The act further provided that "if upon such examination the probate court shall be of opinion that the person or persons so accused is or are guilty of having concealed, embezzled or carried away any of the money, goods," etc., of the estate, "the court shall forthwith render judgment in favor of the executor, etc., against such person for the amount or value of the money or goods, together with ten per cent. penalty, which judgment, the act declared, shall be a lien upon his estate and be collected by execution."

In *Howell v. Fry*, 19 O. S., 556, the constitutionality of this act was attacked, on the ground that it provided for a trial of the right of property to court and without the intervention of a jury. The court held the law unconstitutional, and in its opinion said:

"If the defendant denied the truth of the charge, he had a constitutional right to a jury trial, and could not be deprived of that right by this summary proceeding, in which no provision is made for a jury trial or for the right of appeal. The statutory provision authorizing a judgment can only be sustained as constitutional and valid in so far as it applies to a case where the defendant does not controvert the truth of the complaint."

Thereupon the statute was amended so as to cure the defect found in it by the court in *Howell v. Fry*, *supra*. It is found in Sections 10673, *et seq.*, of the General Code:

"Section 10673. Upon complaint made to the probate court or the common pleas court of any county, by the executor, administrator, creditor, devisee, legatee, heir or other person interested in the estate of a deceased person, or by the creditor of any devisee, legatee, heir or other person interested in such estate, against the executor or administrator of such deceased person, or against any person suspected of having concealed, embezzled, or conveyed away moneys, goods chattels, things in

action, or effects of such decedent, the court shall cite such executor, administrator or other person suspected, forthwith to appear before it to be examined, on oath, touching the matter of the complaint.

"Section 10674. When complaint is made to the probate court and a jury is demanded by either party, the court may forthwith reserve the case to the court of common pleas for hearing and determination, and it thereupon shall proceed in all respects as though the complaint had been originally made therein."

"Section 10678. By the verdict of a jury, if either party requires it, or without, if not required, the court shall determine whether the person or persons accused is or are guilty of either having concealed, embezzled or conveyed away moneys, goods, chattels, things in action or effects of such deceased persons, and if found guilty, the amount of damages to be recovered on account thereof. In all cases except when the person so found guilty is the executor or administrator of such deceased person, the court forthwith shall render judgment in favor of the executor or administrator or if there be no executor or administrator in this state, in favor of the estate, against the person or persons so found guilty for the amount of the moneys or the value of the goods, chattels, things in action, or effects so concealed, embezzled or conveyed away, together with ten per cent. penalty and all costs of such proceedings or complaint, which judgment shall be a lien upon the real estate of the person or persons against whom it is rendered within the county from the rendition thereof. If the party so found guilty is the executor or administrator of such deceased person, the court forthwith shall render like judgment in favor of the estate against him for such amount or value, together with penalty and costs as aforesaid.

"Section 10679. Such judgment shall be a lien upon the real estate of the executor or administrator, within the county from the rendition thereof. The probate court must forthwith remove such executor or administrator and commit the administration of the estate, not already administered, to some other person or persons. The executor or administrator so removed, shall not receive compensation for acting as such, and must be charged in his account with the amount of such judgment. His property also shall be liable for the satisfaction of the judgment on execution issued thereon by his successor, who, when the judgment is rendered by the probate court, must file a transcript with the clerk of the common pleas court and cause such proceedings to be had as are contemplated in the next following section.

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"Section 10680. The executor or administrator in whose favor such a judgment has been rendered by the probate court, may forthwith deliver to the clerk of the common pleas court in the county, an authenticated transcript which the probate judge on demand of such personal representative shall make out and deliver to him. On such transcript the clerk forthwith must issue an execution of the common pleas court for the amount of the judgment and costs, and the costs accrued, or that may accrue thereon. Thenceforth proceedings on execution shall be the same as if the judgment had been rendered in such court."

In our opinion the act now provides for a trial of the right of property, and a judgment entered by the probate court, in proceedings before it pursuant to the provisions of said act, may be pleaded in bar of another action to try the title to or the right of possession of the property involved in said proceedings.

But few of the states have statutes on this subject similar to ours. Authorities, therefore, which might aid us in arriving at a correct conclusion in the case at bar are not numerous. The statute of Missouri on this subject is similar in substance to that of Ohio, and the Missouri courts have held that it contemplates a trial of the right of property.

In *Re Estate of Jacob Huffman, Deceased, et al v. Huffman*, 132 Missouri Appeals Reports, 44, paragraph 2 of the syllabus is as follows:

"In a proceeding under the provisions of Sections 74 and 78, Revised Statutes 1899, interrogatories may be exhibited against the person cited and evidence heard on them to try the right of property, concealed or embezzled or otherwise wrongfully withheld by such person; the former rulings that such a proceeding was only to facilitate the discovery of hidden assets, preliminary to an action to recover them, and a showing, on the part of the person proceeded against, that they were held in good faith, would stop further proceedings, are unsound in principle and in conflict with the decisions of the Supreme Court."

In the opinion the court say:

"The Missouri statutes dealing with the subject differ from those of all the other states we have examined in essential particulars; chiefly in providing for a trial by jury of the issues

raised. This provision is not found in any of the statutes of other states cited *infra*, except Maryland (and we might add, Ohio); and text-writers derive the proposition that the right of property can not be tried in a proceeding like this one, from cases in other jurisdictions. * * * But those cases, so far as the decisions are based on the lack of a statutory provision for a trial by jury, should be eliminated in considering the effect of our statutes. The opinions usually treat this omission as the decisive reason for saying property rights can not be determined. * * * In Maryland the Orphans' Court of probate jurisdiction, in analogy to the old chancery practice, may refer the issues to a law court to be tried but can not try them itself. * * * Under statutes granting this privilege, it was held in a majority opinion, the jurisdiction of the orphan's court was confined to determining whether or not the defendant had concealed the property mentioned in the affidavit, and if he openly admitted possession, but claimed title, his right could not be determined. A dissent was filed. *Gilson v. Cook*, Admr., 62 Md., 256. In several states the sole aim of the law is the discovery of assets—not to compel the party in possession to turn over or inventory property, but to compel him to submit to an examination in order that his statements, and some times those of other witnesses as well, may be filed in writing as a basis for other proceedings to recover the property. * * * In New York the statutes expressly provide that if the defendant files a verified answer alleging ownership of the property, the proceeding shall be dismissed without further examination. * * * The Texas statutes pertain only to papers and documents belonging to the estate. * * * The statutes of Arkansas, Utah and Nevada permit a summary order by the court for the delivery of the detained property, but provide for no examination of witnesses or jury trial. * * * The following decisions held the purpose of the statutes dealt with was to provide a means of discovery, not recovery, of assets; *Gardner v. Gillihan*, 20 Ore., 598; and others. It will be seen from the foregoing summary of statutes and cases that the adjudications in other jurisdictions can lend little assistance in the attempt to ascertain the object and effect of our statutes, in consequence of the wider scope of the procedure these provide and the use materially different language—language suggestive of an intention to create a new method of both discovery and recovery. It is worthy of note that in the statutes of 1845, where the proceeding was first authorized and presumably the policy of the Legislature put into effect, it is said if the defendant appears and in his answer to the interrogatories denies the right of the executor or administrator to the goods, chattels, money, etc.,

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'the right thereof shall be tried by a jury; or, if neither party require a jury, by the court, in a summary manner, and judgment shall be rendered according to the right and for costs.' This language imports a purpose to provide a method for determining the right of property as between the estate and the person accused of concealing or embezzling assets. The statutes of 1855 (Sec. 10) instead of saying the right shall be tried, say the issue shall be tried; meaning the issue of whether the property is concealed or embezzled. The present statutes cover assets concealed, embezzled or otherwise wrongfully withheld, and Sections 77 and 78 say the issue upon the interrogatories and answers filed, shall be tried by a jury, etc., and if the defendant is convicted, the court shall compel him to deliver the property detained; or if he be an executor or administrator, compel him to inventory it. In our opinion this legislation was not enacted merely to provide a method of investigating the good faith of a person who detains assets, but to provide also a remedy by which detained assets could be brought quickly into the course of administration. The notion that the only object was to facilitate the discovery of hidden assets, preliminary to an action to recover them, is fallacious and founded on the decisions of jurisdictions where statutes, enacted only to assist discovery, prevail; and which do not take care of the constitutional right of trial by jury in cases involving property rights, because no property rights are involved under said statutes, but only information. In this state a jury trial of the issues is allowed and also an appeal; thus preserving to a defendant all the rights he would enjoy in any other form of action. It is unlikely that this elaborate procedure was devised simply to discover assets. The purpose was broader—to expedite the administration of estates by affording a new and speedy remedy for collecting assets."

On these considerations, we find no error in the record, and the judgment of the court of common pleas is affirmed.

GRANT, J., and CARPENTER, J., concur.

MORTGAGEE GIVEN PRIOR LIEN BY SUBROGATION.

Court of Appeals for Hamilton County.

**THE EAST END LOAN ASSOCIATION COMPANY V. THE METHODIST
BOOK CONCERN, ETC., ET AL.**

Decided, June 24, 1918.

*Priority of Liens—Lien of a Judgment Creditor Subsequent to that
of a Later Mortgagee, When.*

The fact that a judgment, by relating back to the first day of the term during which it was rendered antedates the execution of a mortgage, does not give the judgment creditor a prior lien, where the proceeds of the mortgage were, by agreement with mortgagor, used in liquidating previously existing liens, and the mortgagee thereby became subrogated to the rights of said former lienholders.

*M. W. Conway and David Davis, for plaintiff.
Wolf & Bailey, contra.*

WILSON, J.

This action was brought in the court below by the Methodist Book Concern, a corporation, against Mary B. Corwin, the East End Loan Association Company et al, to enforce the collection of a judgment, marshal liens and for the sale of real estate, the judgment having been recovered on January 11, 1917, and by force of statute related back to the first day of the term of court, to-wit, January 2, 1917.

The defendant, the East End Loan Association Company, filed a second amended answer and cross-petition therein alleging that on January 9, 1917, it loaned to Mary B. Corwin the sum of \$2,000, secured by a mortgage of that date on the property described in plaintiff's petition, and further alleging that said money was applied by it at the request and direction of Mary B. Corwin to the payment of a \$1,500 mortgage on the property held by the Southern Ohio Loan & Trust Company, dated February 7, 1913, and a \$500 obligation of Mary B. Cor-

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win to Edward B. Quinn secured by a conveyance by way of deed, of the legal title to said property to said Quinn, dated August 26, 1916, with a lease back containing a privilege of purchase for the sum of \$500; that said obligations were paid on said January 9, 1917, and said property was then and there conveyed by said Quinn to said Mary B. Corwin, who thereupon executed the mortgage to said loan association company. Said company by reason of the facts so alleged claimed a right to be subrogated to the rights of the lienholders so paid by it and prayed that it might be so subrogated and declared to have the first and best lien on said property prior and superior to the lien asserted by the plaintiff.

To this answer and cross-petition the plaintiff demurred on the ground "that it does not state facts sufficient in law to entitle it to priority over plaintiff's judgment lien." The court below sustained the demurrer and entered a judgment in favor of plaintiff, holding that it had a prior and superior lien to the mortgage of the East End Loan Association Company, to which the said company excepted.

The question presented for the consideration of this court is as to whether or not the facts alleged, if proven, would entitle the said defendant, the East End Loan Association Company, to be subrogated to the rights of the prior lienholders whose secured claims were so paid by the said company at the request and direction of the mortgagor.

It will be observed that on January 2, 1917, when it is claimed the plaintiff's lien attached to the property, the two liens of the Southern Ohio Loan & Trust Company and Edward B. Quinn aggregating \$2,000 were then subsisting liens on the property, so that if the East End Loan Association Company is subrogated to the rights of said two lienholders, it will work no injustice to the rights of the Methodist Book Concern, as its security remains the same as when the lien attached and its position will in no way be changed for the worse on account thereof.

The right of subrogation is founded in equity, and will be invoked only when necessary to secure some equitable right and without which an injustice will be done.

In *Straman, Admr., v. Rechtine*, 58 O. S., 443, the court say:

“Where money is loaned under an agreement that it shall be used in the payment of a lien on real estate, and it is so used, and the agreement is that the one who so loans the money shall have a first mortgage lien on the same lands to secure his money and through some defect in the new mortgage or oversight as to other liens, the money can not be made on the last mortgage, the mortgagee has a right to be subrogated to the lien which was paid by the money so by him loaned, when it can be done without placing greater burdens upon the intervening lienholders than they would have borne if the old mortgage had not been released.”

To the same effect are the cases of *Amick v. Woodworth et al*, 58 O. S., 86; *Joyce v. Dauntz*, 55 O. S., 538.

The court is of the opinion that the facts alleged in said answer and cross-petition, if proven, will entitle the East End Loan Association Company to be subrogated to the rights of the lienholders so paid by it out of said \$2,000, and that the allegations contained in said answer and cross-petition are sufficient to state a cause of action for such relief, and that the court below erred in sustaining said demurrer.

“An answer which seeks affirmative relief must be treated as a cross-petition, and if the facts therein set forth entitle the defendant to any relief, the defense thus set up is good as against a general demurrer.” *Cincinnati & Columbus Traction Co. v. Jewett Car Co.*, 11 C.C.(N.S.), 189.

This court has some doubt as to the right of the court below to entertain and pass upon said demurrer by reason of the fact that it does not conform to the requirements of the code. However, it appears upon inspection of the record that the court below, while sustaining said demurrer and the said defendant having declined to further plead, did proceed on final distribution as though said demurrer had not been sustained, to determine the rights of said loan association company, although said company was not in court with any pleading, and ordered it to pay a portion of the costs, and further ordered paid to it out of the proceeds of the sale the sum of \$516.99 on account of its distributive share of said proceeds. The court having

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found the lien of the Methodist Book Concern to be the first lien on the fund so realized, and entitled to be paid before the claim and lien of the East End Loan Association Company, ordered its claim paid in full out of the proceeds of said sale, to all of which said company excepted.

By reason of the erroneous action of the court below in sustaining said demurrer and in adjudging and decreeing that the lien of the Methodist Book Concern was prior and superior to the lien of the East End Loan Association Company and distributing the proceeds of the sale in the manner it did, prejudicial to the rights of the East End Loan Association Company, this court orders the judgment of the court below in sustaining said demurrer, and the finding, judgment and decree of the court in determining and marshalling the liens on said property and distributing the proceeds thereof be reversed, and that this cause be remanded to the court below for further proceedings according to law.

JONES, P. J., and HAMILTON, J., concur.

REPAIR OF PUBLIC HIGHWAYS.

Court of Appeals for Brown County.

GEORGE KRESS v. CORNELIUS WILSON, TREASURER OF
BROWN COUNTY, OHIO.

Decided, July 17, 1917.

Roads—Levies for Repair of—Conditions Caused by Freshets and Repairing Emergency Levies—Repairs Necessitated by Neglect or Long Use—Limitation on the Aggregate Levy.

A levy for the repair of roads under favor of Section 7419, General Code, when no emergency exists, is controlled by Section 5649-2, General Code, and must be within its limitations.

Young & Barnes, for plaintiff in error.

R. E. Campbell, John R. Moore and John M. Markley, Prosecuting Attorney, contra.

MIDDLETON, J.

This action was instituted in the court of common pleas of this county by the plaintiff in error, George Kress, for himself and others as tax-payers, to enjoin the collection of a levy of two mills on the dollar of all the taxable property situate in said county, said levy having been made for the year 1916 by the board of county commissioners for the repair of certain public highways under favor of Section 7419, General Code.

The petition sets forth in detail the resolution adopted by the board of county commissioners under which said levy was made, and this resolution shows that in every instance it was found and declared that each public highway to be affected by the levy had been damaged by freshets, and that by reason thereof and by reason of a large amount of traffic thereon, and from neglect and inattention to the repair thereof, said highway had become unfit for travel and caused difficulty, danger and delay to teams passing thereon. The petition further alleges that said public highways "had not been damaged by freshets, landslides, wear of water-courses or other casualties, but that the condition thereof was caused from neglect and inattention and by reason of a large amount of traffic thereon, and that by reason thereof the said county commissioners had no authority of law to make said levy of two mills and the same is void."

To this petition the defendant in error, the county treasurer, filed an answer which contains three defenses, the first of which may be considered merely a denial of the operative facts in the petition. In his second defense, however, the treasurer alleges that the aggregate tax rate in the taxing district in which the plaintiff in error resides, including the levy involved in this action, was and is less than fifteen mills on the dollar of the taxable property therein; and in his third defense he pleads that in no taxing district in the county does the tax rate exceed said fifteen mills, including this levy of two mills.

The plaintiff filed a demurrer to the second and third defenses aforesaid, upon consideration whereof the court of common pleas held that said defenses were sufficient but that the petition itself did not state a cause of action. The plaintiff not de-

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siring to plead farther, a judgment of dismissal was entered, to reverse which judgment these proceedings are now prosecuted here.

It appears from the facts stated in the petition and the claims now made by the plaintiff in error that he launched this case upon the theory that if no emergency existed requiring the levy in question, the board of county commissioners, under the provisions of said Section 7419, were without any authority to make said levy.

Whatever doubt and uncertainty have heretofore obtained in the courts and with the taxing authorities of this state in respect to the construction to be given Section 7419 are now removed by the very recent case of *State, ex rel, v. Zangerle*, 95 O. S., 1. In this case it is held that roads affected by the provisions of said section are of two classes, and Judge Mathias, who announced the majority opinion of the court, discussing this phase of the case says—

“Roads requiring reconstruction or repair are of two general classes, the first embracing those roads which have been destroyed or damaged by freshet, landslide, wear of water courses, or other casualty, any one of which conditions comes within the term ‘emergency’ as above defined; the second, those roads which by reason of the large amount of traffic thereon or from neglect or inattention to the repair thereof have become unfit for travel or cause difficulty, danger or delay to teams passing thereon.”

The resolution adopted by the commissioners aforesaid, as before observed, finds and declares conditions to exist in respect to each turnpike which places each road within both classes as above enumerated and defined. In other words, it is found and declared by the commissioners in said resolution that an emergency exists as to each road, and farther that all the other conditions also exist in respect thereto which are set forth in said section and which, under the definition above given, may be said not to constitute an emergency. We are now dealing with what this resolution contains only as an abstract proposition of law and are, therefore, not concerned with any appar-

ent conflicting and inconsistent findings that may appear therein. It therefore follows that the plaintiff when he adopted the whole resolution without question and bases his petition upon its declarations and does not attempt to dispose of any of the facts alleged therein except those which refer to the existence of an emergency, has met only one phase of the situation. If it be true, as he alleges in his petition, that no emergency may be shown to exist as to any of the roads named this fact will only remove them from the first class as specified in *State v. Zangerle, supra*, and as roads of the second class they still may be repaired by a levy under favor of this section within certain limitations. The only distinction between the two classes of roads which may be repaired under favor of this section is, that a levy for the repair of the first or emergency class may be made independent of the so-called Smith Law (being Sections 5649-1, *et seq.*, G. C.), while a levy for the second class or for roads which are out of repair by reason of the large amount of travel thereon or from neglect and inattention must be made within the limitations of said law. *State v. Zangerle, supra*.

The material matter now to be considered, however, is that the plaintiff does not in his petition in any manner whatever question, challenge or deny that conditions obtain, as stated in said resolution, which will authorize a levy if the roads named have become and are out of repair and dangerous by reason of the large amount of travel thereon or from inattention and neglect. We are, therefore, impelled to conclude that in this respect the petition is defective and does not cover the whole situation as presented by the facts stated therein and, therefore, is insufficient to sustain an action for an injunction.

The judgment of the lower court, therefore, in sustaining a demurrer to the petition will be affirmed.

As before observed, a demurrer was filed to the second and third defenses of the answer, which was overruled by the learned trial judge and which ruling must now be affirmed for the reason that any answer to a defective petition must be held good as against a demurrer. But in thus affirming this entry we do not thereby sustain the sufficiency of the facts, stated in the de-

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fenses aforesaid, were they pleaded in answer to a good petition. The theory of these defenses is that so long as the aggregate tax rate, including the levy under Section 7419 aforesaid, does not in any taxing district in the county exceed fifteen mills, any of the conditions specified in said section, when found to exist, will sustain this levy. As we have already indicated, we do not question the proposition that a levy may be made under favor of Section 7419 which is within the limitations of the Smith law if conditions are shown to exist other than emergency as defined in *State v. Zangerle, supra*, but we can not adopt the contention that a limitation of fifteen mills may apply to such a levy. Upon the contrary, the limitation of the Smith law applying to this levy is ten mills, as provided by Section 5649-2, which section controls and fixes the aggregate amount which may be levied under the facts as shown here and which must include this levy of two mills if it is to repair only such roads as have become dangerous by reason of neglect and inattention or because of a large amount of travel thereon.

In the case of *State, ex rel, v. Zanzenbacher*, 84 O. S., 506, the relative bearing of Sections 5649-2 and 5649-3a on the aggregate amount of taxes that may be levied was considered and determined by the court, and the former section was held to be the controlling law, while the latter section was considered as having only to do with interior limitations. While taxing authorities, therefore, may levy the full amount specified in the latter section for any one, or even more, of the purposes specified therein, yet they may not make such levy for all, for in that event the aggregate amount levied would exceed the ten mills prescribed in the former section and it would impose upon the budget commission the duty of eventually reducing the levy so made to conform to the provisions of said last named section. *Rabe v. Board of Education*, 88 O. S., 418, *State, ex rel, v. Patterson*, 93 O. S., 34. We are, therefore, of the opinion that the facts stated in the second and third defenses of the defendant's answer would not constitute a valid defense to a good cause of action.

While the pleadings do not disclose the actual tax rate in the taxing districts in which the plaintiff in error resides, it appears

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from one of defendant in error's briefs that it is made up as follows:

County (other than road under Case Highway law) ..	2.8	mills.
Township (other than road under Case highway law) .	.95	mills.
School	5.0	mills.
		<hr/>
Making a total of	8.75	mills.

Manifestly, if these figures are true, the addition of two mills on the levy herein will make the aggregate rate 10.75 mills, which is in excess of the limitations of said Section 5649-2 and contravenes its provisions. If, therefore, no emergency may be shown in this case to sustain this levy, and the foregoing facts are true, the levy is without authority of law and void.

We are, therefore, of the opinion that it is our duty in affirming the judgment herein of the lower court to remand this case to that court for further proceedings according to law, which would include leave in said court to the plaintiff in error to file an amended petition setting forth in full the facts in respect to the aggregate amount of the tax rate in the district involved.

WALTERS, J., concurs. SAYRE, J., not sitting.

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**LEGAL EVIDENCE INCLUDES EVERY KNOWN MEANS FOR
ASCERTAINING THE TRUTH.**

Court of Appeals for Van Wert County.

**THE PENNSYLVANIA COMPANY V. THE IRETON BROTHERS
COMPANY,**

Decided, April 22, 1918.

*Weight of Evidence—Finding of Jury Will Not be Set Aside—Where
Reasonable Under All the Light Obtainable in the Case.*

Where the claim of plaintiff is reasonable under all the surrounding circumstances and the facts as developed by proper evidence, and the judgment below is responsive thereto, and the loss must fall upon one of the parties to the case, the finding of the jury under proper instructions from the trial judge will not be disturbed by a reviewing court.

*Wheeler & Bentley and Clark Good, for plaintiff in error.
Dailey & Hoke and H. L. Conn, contra.*

Houck, J. (of the Fifth Appellate District, sitting in place of Hughes, J.).

Error to the court of common pleas.

The Pennsylvania Company operates, controls and manages a line of railroad running through the city of Van Wert, Ohio, from Chicago to Pittsburgh, with tracks, cars, locomotives and other appurtenances thereto belonging, and the defendant in error, the Ireton Brothers Company, owned a hay barn located on the north side of the right-of-way of the Pennsylvania Railway tracks, and on the east side of Walnut street, in the city of Van Wert, and about one o'clock p. m., of September 26th, 1916, the said hay barn, together with the contents, burned. Shortly before the fire was discovered, an engine and several cars owned and operated by plaintiff in error passed along and upon its tracks and by said barn.

Just prior to the time that said engine and cars passed said hay barn the engine had been standing still for nearly an hour.

Employees of the defendant in error had been unloading and storing hay in said barn during the forenoon, and had worked in and about the barn until about eleven or twelve o'clock noon of that day. When the fire was first discovered in the barn it was at the top, in the southeast corner. Shortly before this the locomotive in question passed said barn and was puffing very loudly and throwing out a large amount of black smoke and red cinders. The defendant in error filed its action in the Court of Common Pleas of Van Wert County, Ohio, in which it asked for a judgment in the sum of \$1,622.95, with interest from the 26th day of September, 1916. The issues in the case were raised by the allegations in the petition of plaintiff and the answer of the defendant, which was in substance a general denial. Said cause was tried to a jury, which resulted in favor of the plaintiff below in the sum of \$1,396.68, and the trial court entered judgment on the verdict.

A reversal of the judgment is sought in this court for two reasons:

First. That there was no legal evidence offered in support of the verdict and judgment.

Second. That the verdict of the jury was against the weight of the evidence.

As to the first claim of plaintiff in error, which in substance is that a demurrer to the evidence of plaintiff should have been sustained by the trial judge, we will say that we have read all of the evidence offered by the plaintiff and defendant, as embodied in the bill of exceptions, the same being necessary for the proper determination of the questions raised by counsel in the case.

Had plaintiff below, at the time it rested its case, made by the evidence thus offered a *prima facie* case, or established such facts as would entitle it to prevail, if not rebutted or disputed? In order to do so, it must have sustained by proper proof each and all of the material allegations of its petition; and this can only be determined from the proven facts as contained in the testimony offered in its behalf as found in the bill of exceptions.

It is urged that from these facts it was a physical impossibility for the locomotive in question to have caused the fire. This is based upon the conceded facts in the case, as to the location of the

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barn from the railroad track; the place where the engine stood prior to the fire; the rapidity with which it traveled past the barn, and its location where it stopped and was standing at the time the barn was discovered to be on fire.

Legal evidence is not confined to mere oral testimony and statements made by witnesses, but it includes every known means obtainable to ascertain the truth about any disputed question of fact. All the circumstances and surroundings must be taken into consideration, and if when taken together they raise a mere suspicion as to the truthfulness of the claim made, the same is not sufficient. But in the case now before us, where the facts and all the surrounding circumstances seem to point to the reasonableness of the claim of plaintiff below, we hold the rule to be that as between parties situated as the ones in the present case, where the loss must fall upon one or the other, it is just, legal and right, and the law casts it upon the one shown to have been the cause of the loss, if the proof establishes the reasonable probability of such fact.

If this rule is sound, and we feel that it is, then applying it to the present case the judgment below must stand, unless we further find from all of the evidence in the case, that the verdict of the jury was against the weight of the evidence. In the weighing of evidence it is not a mere question of mathematics, nor is it to be determined by mere conjecture, but depends upon its effect in inducing the jury or court to reach a proper conclusion based wholly and entirely upon the adduced facts.

The question here for determination is as to whether or not the proof on the part of the plaintiff below is greater than that of the defendant, as shown by all of the evidence in the case as contained in the bill of exceptions. If it is, then the judgment should be affirmed; otherwise reversed. No complaint is made by counsel as to the law of the case as charged by the trial judge, yet we have read it and find that it fully and completely covers every issue of fact and law in the case. If a reviewing court was clothed with the same power as a jury in passing upon facts, and could see and hear the witnesses and observe their demeanor while upon the witness stand, instead of being compelled to rely upon their typewritten testimony alone,

it would be a great aid in determining the question as to whether or not the evidence was properly weighed by the jury. The jury is not only the judge of the credibility of the witnesses, but of the weight of the evidence given by them, and a reviewing court is not authorized or justified in setting aside a verdict of a jury because it is claimed that it is against the weight of the evidence, unless after a careful examination of the whole record in the case it is clearly and fully satisfied that such verdict was manifestly against the weight of the evidence. The Supreme Court of our state has said, "Where there is no dispute or conflict in the testimony of different witnesses, but nevertheless the unconflicting testimony discloses a variety of circumstances from which different minds may reasonably arrive at different conclusions as to the ultimate fact shown by such evidence, then it is the duty of the jury to determine such ultimate fact."

The ultimate fact as to whether or not the plaintiff in error was the cause of the mischief complained of in the case at bar having been determined by the jury under proper evidence submitted to it, and under proper instructions as to the law by the trial judge, a reviewing court has no authority in law to disturb the verdict of the jury.

Counsel for plaintiff in error insist that the following rule of law be applied to this case:

"A scintilla of evidence is enough to send the case to the jury, but a preponderance of the evidence constitutes the degree as to the weight to which the party on whom the burden of proof rests must have in order to have sufficient evidence to sustain the verdict, and preponderance is the test measure of the weight of the evidence. If it does not preponderate in favor of the party the weight is not with him. If it is evenly balanced, the weight is not with the party. If the evidence does not preponderate in favor of the party sustaining the burden, then and only then may it be said that the verdict in his favor is not sustained by sufficient evidence."

We heartily agree with learned counsel that this proposition of law is sound, and that it is clearly applicable to the issues raised by the pleadings and the proven facts in the case now before us under review, and that when so applied it is decisive of same,

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and that by reason thereof but one conclusion can be reached, and that is that the judgment below is responsive to the facts and law, and must be affirmed.

Judgment affirmed.

KINDER, J., and CROW, J., concur.

**VALIDITY OF STIPULATION IN A CONTRACT THAT ALL
WORK SHALL BE DONE BY UNION MEN.**

Court of Appeals for Franklin County.

LOCAL BRANCH NO. 248, NATIONAL DECORATORS AND PAINTERS
ASSOCIATION OF AMERICA ET AL V. BENJAMIN C. SOLT.

Decided, March, 1918.

*Combinations of Workmen and Legitimate Means for Enforcing Their
Demands—Owner May Contract that Work Shall be Performed by
Union Labor Only—Union May Insist that Such Provision be Ad-
hered to—Non-Union Contractor, Shut Out by Such Stipulation,
is Without Ground for Action Against the Union.*

1. Where the owner agrees to the exclusive employment of union labor in the construction of a proposed building and where union workmen acting and relying thereon have accepted employment the subsequent employment of a non-union workman for the execution of a branch of the work is a violation of the owner's agreement and a mere threatened withdrawal by the union workman or by the union in their behalf, in the event that the non-union workman is not discharged, is not illegal.
2. Where a non-union workman is employed for the execution of a branch of the work under plans and specifications requiring the exclusive employment of union labor and is discharged by the owner in consequence of a threat of the union labor employed upon the building to strike if the non-union workman is not discharged, the non-union workman has no cause of action against the labor union where no malice is charged and where no violence or other unlawful means is threatened.

*F. S. Monnett, H. H. Felsman and Robert J. Beatty, for
plaintiff in error.*

N. B. Collins, contra.

ALLREAD, J.

Solt, a master painter, obtained a contract from the Photo Play & Amusement Company, the owner and builder of the Majestic Theater, for the finishing and painting of the wood-work of the lobby and canopy or marquise for the sum of \$270.

The building was constructed by different contractors under plans and specifications adopted by the owner. These plans and specifications included notice to bidders containing the following clause:

"Union Labor—Each and every contract entered into under these specifications and accompanying plans shall be executed in every detail by union labor."

Solt personally undertook to do most of the work embraced in his contract. Later he was assisted by a union painter procured by the superintendent of construction.

Solt admits that he had not for several years held a union card, nor had he signed the union scale of wages.

It appears that at the time Solt obtained his contract the work upon the building was nearing completion and the time had been fixed and published for the opening of the theater. Work upon other contracts was being executed wholly by union labor. Complaint having been made to Local No. 248, one of the plaintiffs in error, an investigation was had and resulted in the appointment of a committee who called upon the representative of the owner and notified them that unless Solt was withdrawn the unions would declare him unfair and call off all union labor then at work upon the building.

Neither in the petition nor in the evidence does it appear that there was any threat of violence, of boycotting or of preventing the employment of other workmen to complete the building. The sum and substance of the demand and threat was merely the withdrawal of union labor from the work.

The case presents a somewhat unusual feature. Modern statutes and modern decisions we think, recognize the rightful place of labor unions as organizations in the advancement of the interest of the laboring classes and their rights and limitations have

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been frequently considered. The weight of authority upholds the right of a labor union, in the absence of an inconsistent contract, to advise and procure the withdrawal of union labor from a given work either singly or in combination, where no violence or other unlawful means are employed and where the object of the strike is not unlawful. *Fulworth Garment Co. v. International Ladies' Garment Workers Union*, 15 N.P.(N.S.), 353; *Kemp v. Division No. 241*, 255 Ill., 213; *Iron Moulders Union v. Allis-Chalmers Co.*, 166 Fed., 45; *J. F. Parkmen Co. v. Builders Trades Council*, 154 Col., 581; 16 Ruling Case Law, pp. 444-460.

A strike is defined as "the act of a party of workmen, employed by the same master, in stopping work altogether at a pre-concerted time and refusing to continue until higher wages or shorter time or some other concession is granted to them by the employer." (Black Law Dictionary.)

Bouviere defines a strike as "a combined effort of workmen to obtain higher wages or other concessions from their employers by stopping work at a preconcerted time."

In *Kemp v. Division No. 241*, *supra*, it is said: "The threat made by the committee that the members of the union would call a strike of the employees of the railway company unless their demands were complied with, meant no more than that the union employees would be notified to quit in a body at a definite time if the non-union employees were retained in the service."

So here the threat of the committee of the locals to call a strike meant no more than that they would call off the union workmen from the building if their demands were not met by the employer.

This brings us to the legality of the purpose of the proposed strike.

The owner had voluntarily agreed to the exclusive employment of union labor in the execution of every detail. The consideration for this agreement is based upon the presumed advantage arising out of the employment of union labor. The contract was for the benefit of union labor. After the contract had been recognized and acted upon by union workmen

the same became a valid obligation. The employer had obtained the benefit of the provision throughout the work of construction and up almost to the time of completion of the building.

The recent cases sustain the validity of contracts by the employer for the exclusive employment of union labor, particularly where the supply of union labor is adequate or where provision is made for the unionizing of workmen in case of shortage. *Nat'l Fireproofing Co. v. Masons' Builders Assn.*, 169 Fed., 260; *Jacobs v. Cohen*, 183 N. Y., 207; *Mills v. U. S. Printing Co.*, 99 App. Div. (N. Y.), 185; *Hoban v. Dempsey*, 217 Mass., 166; 16 Ruling Case Law, 426; *Contra, Curran v. Galen*, 152 N. Y., 83; *Berry v. Donovan*, 188 Mass., 353.

We are not required to express an opinion as to the natural and constitutional right of labor unions to interfere between employer and other employees who are willing to accept employment. In this case the employer agreed to employ union labor exclusively. There was no duress or unfair means used to secure the contract. The contract was voluntary and was by implication a recognition of the right of the locals to act on behalf of and in the interest of union labor. The condition in the contract for the exclusive employment of union labor entered into and became a condition of employment in all branches of the building contract and the union workmen had the legal right to withdraw from the work at any time the condition was violated.

This was the situation as between the union labor employed on the building and the employer, and we think it clear that the locals and the committee acting on their behalf had the right when the condition of employment was violated, to order the withdrawal of union labor from the work.

There is a question raised as to whether Solt's obtaining the contract and working upon the job was itself a violation of the employer's contract with union labor.

Solt undertook personally to do most of the work contracted for, although he admits that he was not affiliated with any labor organization and had signed no union wage scale. He was of the opinion that his taking the contract was not a violation of

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the contract for the employment of union labor, and the owner and its agents were of the same opinion and acted in good faith, although we believe mistakenly.

Whatever might have been Solt's right as contractor and as overseer or superintendent of the work, we think under a fair construction of the agreement as to union labor there was a violation of the contract when he undertook to do the work himself. The owner in contracting with union labor clearly contemplated that the work in every detail should be performed by union labor. This contract could not, in our judgment, be fulfilled by letting the work to one or more non-union contractors to personally perform the labor.

Solt testified that he examined the portion of the specifications relating to painting before he took the contract. The specifications as to painting referred to the notice to bidders which contained the provisions as to the exclusive employment of union labor.

While Solt testified that nothing was said in his verbal contract as to the employment of union labor, yet we think it sufficiently appears from his own testimony that he knew that union labor was required to be employed upon all features of the building.

Solt's rights are, therefore, under all the evidence clearly subject to the condition as to the exclusive employment of union labor and his right would, therefore, rise no higher than that of his employer.

But even if Solt took his contract in ignorance of the condition expressed in the owner's contract as to union labor, then his right of action, if any, would be against the owner and not against the labor organization.

The plaintiffs in error having, therefore, acted within their legal rights, the threatened strike was not illegal and the discharge of Solt, so far as the plaintiffs in error were concerned, is *damnan absque injuria*. 16 Ruling Case Law, 460.

The fact that certain members of the locals obtained employment after the discharge of Solt does not change the legal status. There is no charge of malice and it was a natural and anticipated

result that some of the union would be benefited by the performance of the union labor contract.

Plaintiffs in error moved at the close of the plaintiff's evidence and also at the close of all the evidence for an instructed verdict in their favor. The court overruled the motions and submitted the case to the jury which returned a verdict for \$500. A judgment was rendered upon the verdict and error is prosecuted to this court.

We have reached the conclusion that the motions of the plaintiffs in error for a directed verdict should have been sustained.

The judgment of the court of common pleas is therefore reversed and final judgment in favor of plaintiffs in error will be ordered.

KUNKLE, J., and FERNEDING, J., concur.

**AS TO THE TRUTH OR FALSITY OF ANSWERS MADE
BY AN APPLICANT FOR INSURANCE.**

Court of Appeals for Fairfield County.

SOVEREIGN CAMP OF THE WOODMEN OF THE WORLD V. MARY
CLELLAND.

Decided, October 27, 1917.

*Mutual Benefit Societies—Answers of an Applicant for Membership
Must be Considered as a Whole—Determination as to the Truth
or Falsity of Such Answers is for the Jury.*

1. A beneficial association, in resisting payment of a death claim, can not rely on part of the answers made by the decedent in his application for membership and ignore his answers to other questions, but the answers must be taken as a whole in determining their truth or falsity.
2. Whether or not the decedent answered falsely is a question for the jury, and it is not within the province of a reviewing court to set aside the verdict of the jury on such an issue upon the weight of the evidence unless the verdict is clearly and manifestly against the weight of the evidence.

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Ben R. Dolson, John V. Sees and Doud, Crawfis, Bradford & Dones, for plaintiff.

B. E. Shell, contra.

HOUCK, J.

The suit below was to recover on a beneficiary certificate issued on the life of Harry Clelland, now deceased, by the plaintiff in error, on the 14th day of July, 1914. The defendant in error was the beneficiary named in the certificate. Upon issue joined, as made by the petition, answer and reply, the cause was submitted to a jury in the court of common pleas upon the evidence and charge of the court, and after due deliberation a verdict was returned for the plaintiff, Mary Clelland. A motion for a new trial was filed by the plaintiff in error, the defendant below, which the trial judge overruled, and entered a judgment on the verdict.

Error is here prosecuted seeking a reversal of the judgment below, and numerous grounds of alleged error are set out in the petition in error, but in oral argument counsel for plaintiff in error insisted upon but three: (a) That the court erred in not sustaining defendant's motion, after all the evidence was offered, instructing the jury to return a verdict for the defendant; (b) that the trial court erred in its charge to the jury; (c) that the trial court erred in not sustaining the motion of defendant below for a new trial.

We will discuss the alleged errors together, and in doing so we will refer to the parties hereafter as they stood in the court below. An examination of the record discloses that the defendant admitted issuing a membership certificate to the deceased; his death; the presentation of a claim for death benefit, by plaintiff, and the refusal to pay the claim. In its answer the defendant sets up as an affirmative defense that the deceased member had made false representations in his application for membership; had warranted these representations to be true, and had agreed to forfeit all rights under his membership should these representations be false. The reply of plaintiff in substance denied all of the material allegations of defense set forth in the answer of the defendant. The record further discloses

that at the trial it was agreed by counsel in the case and concurred in by the court that the burden of proof was upon defendant, and thereupon defendant offered its evidence in the case, and to maintain the issues raised by the answer the defendant offered in support of the same the application of Harry Clelland, the benefit certificate, and the testimony of three physicians.

The real basis of the defense of defendant was that the member, Harry Clelland, in his application for membership made certain statements as to his health, and that the answers to the interrogatories concerning such health were made by him to Dr. C. G. Axline, the local camp physician and examiner, and that they were written down by said examiner, and after they were so written the said Harry Clelland signed the application; that the application contained a warranty that all of the answers to all of the questions were true, and an agreement that if any of said answers were untrue, the membership of applicant and all rights under the certificate of membership, and the insurance thereunder should be null and void. Defendant insists that among other answers in the application were some to the effect that Harry Clelland did not at any time previous to his application have any disease of the nervous system, nor any disease of the kidneys, nor any disease of dropsical swellings. It is urged by counsel for plaintiff in error that the evidence conclusively shows that the deceased had suffered with at least three diseases specifically mentioned in the application, a short time before signing the same; that in said application said Harry Clelland denied that he ever had any of these diseases, and that in said application he agreed to forfeit all rights against said beneficial society if any of the answers so made in his application were false or untrue.

It is maintained by counsel for defendant in error that this claim is untrue, and is not supported by the evidence submitted at the trial of the case. It is further urged by the defendant in error that the plaintiff in error is estopped from making the claim relied upon by it because Harry Clelland in his application had stated in answer to the question, "Diseases or injury?" the answer, "Breakdown from overwork, date 1910, duration one and one-half years."

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We are of the opinion that the claim made by the defendant in error in this respect is well taken, because it can not properly be contended that the beneficial association can rely upon part of the answers to questions contained in the application and ignore the answer or answers to certain other questions. The application must be taken as a whole, and from it must be determined whether or not any answer or answers to questions were falsely made, or at the time of making such answers the applicant knew they were false or not.

But passing this question, because we do not deem it decisive of the case at bar, and coming now to the true question involved in this controversy, namely, Did Harry Clelland make any misrepresentations in his application for membership? This was a question of fact to be determined by the jury under all the evidence in the case and under proper instructions by the trial judge as to the law governing the established facts.

It is a well known rule of law that litigants in jury trials have the right to submit the evidence to the jury, the weight and sufficiency of such evidence to be passed upon by the jury. It therefore follows that it was within the province of the jury to determine the real question involved in this case, and it is not within the province of a reviewing court to set aside the verdict of a jury upon the weight of the evidence, unless it was manifestly so. Although a reviewing court might have rendered a different verdict than the jury did, if it had been sitting as a jury in the trial of the case under the same state of facts, yet it was for the jury to determine the facts and to weigh the evidence, and that being true, we can not say in the present case that it was improperly done.

Plaintiff in error maintains that the trial judge in his general charge committed errors of law. We have examined the charge with much care and we find that the claim of plaintiff in error in this respect is not well taken. Learned counsel for plaintiff in error also insist that the motion for a new trial should have been sustained, and to this claim we do not agree. An examination of the record discloses that before argument of the case the plaintiff in error, the defendant below, requested the court to give certain propositions of law to the jury. These requests

were made in writing and were given to the jury, and are as follows:

"First. If you find from the evidence that Harry Clelland ever had any disease of the liver before his application for membership in defendant, your verdict must be in favor of the defendant, whether he knew of such disease or not.

"Second. If you find from the evidence that Harry Clelland ever had any disease of the nervous system before his application for membership in defendant, your verdict must be in favor of defendant, whether he knew of such disease or not.

"Third. If you find from the evidence that Harry Clelland ever had any dropsy or dropsical swellings before his application for membership in defendant your verdict must be in favor of defendant, whether he knew of such condition or not."

We have examined these propositions of law and find them sound and clearly applicable to the facts in the case at bar. In view of this we do not understand how plaintiff in error can now complain of the verdict in this case, because the main issue to be determined in this controversy was whether or not the alleged statements made by Harry Clelland in his application were false or not, and the law, as given to the jury in these special requests before argument and which were given at the instance of plaintiff in error, fully and completely covered every phase of the case, so far as the vital question at issue was involved. It therefore seems to us that no prejudicial error appears in the record in this case that would justify a reviewing court in reversing the judgment of the court below, and the judgment of the common pleas court is affirmed.

POWELL, J., and SHIELDS, J., concur.

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Hamilton County.

RELIEF AGAINST SPECIAL ASSESSMENTS.

Court of Appeals for Hamilton County.

THE CINCINNATI ICE CO. ET AL V. CITY OF CINCINNATI ET AL.

Decided, December 6, 1915.

Assessments—Validity of, for Street Improvements—May Not be Enjoined because in Excess of Benefits—Degree of Proof Required—Market Value.

A special assessment will not be enjoined on the ground that the benefits are not equal to the assessment unless it is clearly and convincingly shown, nor will the question of market value before and after the improvement alone be considered.

Geo. J. Slaline and John J. Acomb, for plaintiffs.

Walter M. Schoenle, City Solicitor, and Frank K. Bowman, Assistant City Solicitor, contra.

JONES (Oliver B.), J.

This is an action to contest the validity of an assessment for the improvement of Livingston street, by paving with granite, heard on appeal from the court of insolvency.

While the petition contains allegations of irregularity in the proceedings of council, no attempt was made to support them by any evidence. The only evidence offered by plaintiffs was for the purpose of showing that the assessment was in excess of the benefits. Testimony was submitted by plaintiffs to show that the market value after the completion of the improvement was no greater than it had been before. Defendants, however, produced testimony showing that the market value of plaintiffs' respective lots directly after the improvement exceeded their value immediately before the improvement by a sum largely in excess of the amount of the assessment.

The street had been improved by bowldering in 1867 and 1872. There had been no subsequent improvement until the one in question, and the pavement and curbs were out of repair and in bad condition. The evidence showed that the real estate

in that locality had suffered a general deterioration in value. So, even if the evidence of plaintiffs were taken to the exclusion of that of defendants, it might still be possible that a considerable benefit had been conferred upon the abutting lots by this improvement, even though the market value had remained the same.

It is true that the foundation for the support of a special assessment is the special benefit conferred by the improvement, and that such assessment can in no case exceed such benefit. *Chamberlain v. City of Cleveland*, 34 Ohio St., 551; *Walsh v. Barron, Treas.*, 61 Ohio St., 15, and *Walsh v. Sims, Treas.*, 65 Ohio St., 211.

But an assessment will not be enjoined on the ground that the benefits are not equal to the assessment, unless it is clearly and convincingly shown. Nor will the question of market value before and after the improvement alone be considered. *McMaken v. Hayes et al*, 10 C.C.(N.S.), 38, and *Prentice v. City of Toledo*, 11 C.C.(N.S.), 299.

In this case the evidence fails to convince the court that the assessments are in any instance in excess of the benefits conferred by the improvement, and the petition will therefore be dismissed at plaintiffs' costs.

Petition dismissed.

JONES (E. H.), J., and GORMAN, J., concur.

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**DETERMINATION AS TO WHETHER A COVENANT RUNS
WITH THE LAND.**

Court of Appeals for Harrison County.

INA J. JOHNSON v. THE AMERICAN GAS COMPANY.

Decided, November 28, 1917.

Covenants Running With the Land—May be Created Without the Use of Particular Words—Consistency of the Burden and an Intention to Impose It Are the Determining Factors—Easement for a Pipe Line in Consideration of Free Gas.

1. The use of the word "assigns" or "heirs and assigns" are not necessary or essential to create a covenant running with the land, and in determining whether a covenant will run with the land the material inquiries are whether the parties intended to impose such burden on the land, and whether it is one that may be imposed consistently with principle and equity.
2. Where the owner of farm lands grants to a company, its successors and assigns, the right to lay and maintain a pipe line over said farm for the purpose of transporting gas, in consideration of one dollar and that said company will furnish gas free for one fire in the residence of said owner, and said company lays said pipe line, and it and its successors in title maintain the same, and furnishes free gas in said residence to the then owner, and continues to furnish such gas for a number of years to his first and second successor in title, such covenant runs with the land, and the successor to said company will be required to furnish free gas to the successor or successors in title of said land according to the provisions of such contract, so long as the successor of said company continues to use such right-of-way to transport gas.

W. B. Stevens, and Rowland & Pettay, for plaintiff.

W. L. Handley, contra.

POLLOCK, J.

In November of 1899, John McLandsborough entered into a contract in writing with the Seio Gas Company, by which he granted to said company a right-of-way for a pipe line to convey

gas across his farm in North township, this county. Said contract reads as follows:

“RIGHT-OF-WAY.

“John McLandsborough to the Scio Gas Company.

“Agreement.

“Know all men that I, John McLandsborough, of the county of Harrison and state of Ohio, in consideration of the sum of one dollar to me in hand paid by the Scio Gas Company of Scio, Ohio, do hereby grant to the said the Scio Gas Company, its successors and assigns, the right to lay and maintain a pipe line for transporting gas across my farm in North township, said county, and described as follows:

“Said line to be laid in a course and at a place on said farm to be agreed upon by the parties hereunto before the same is laid. The said the Scio Gas Company, its successors and assigns, shall have the right to enter the premises described herein at all times to repair and maintain said gas lines.

“It is further agreed that the Scio Gas Co. is to furnish free gas for one fire in the residence of said John McLandsborough, said John McLandsborough making his own connections with said gas line. .

“Also all damages to growing crops and to fence caused by laying and maintaining said gas line shall be paid for by the Scio Gas Company.

“It is further agreed that when the Scio Gas Co. shall procure more gas that they will furnish free gas for a second fire under the same conditions as above.

“Said gas line shall be buried if so required by John McLandsborough or assigns.”

This contract is signed by the parties, witnessed by two witnesses and acknowledged before a notary public, and duly recorded as before stated.

In pursuance of the foregoing, said company soon thereafter laid its line for a considerable distance across said premises, and from which line the said John McLandsborough constructed a domestic line to his residence upon said premises and gas was furnished as in said contract provided. In 1904, John McLandsborough died and Seigel McLandsborough, a son, by will took title to said real estate, and said company continued to furnish gas through said domestic line to said residence. In 1911,

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the Scio Gas Company sold and assigned said "right-of-way" to the American Gas Company, which continued to furnish gas to said residence. On January 2, 1913, Seigel McLandsborough conveyed said premises to Ina J. McLandsborough, now Ina J. Johnson, the plaintiff herein, and said American Gas Company continued to furnish gas to said residence until the 26th day of May, 1917, when said company disconnected said domestic line and refused longer to furnish gas in said residence, although it and its predecessor had continuously used said right-of-way since the date of said grant and is still using the same. Soon thereafter a petition was filed in the court of common pleas of this county, asking that a mandatory injunction issue requiring said company to again connect said domestic line with said main line and to furnish gas to said residence; to this petition an answer was filed alleging that said contract or "right-of-way" was merely personal in character between the original parties, and that the covenant as to free gas did not run with the land. To the answer a reply was filed denying the averments thereof, and so the issue was made up, trial had and a decree entered granting said mandatory injunction, from which an appeal was taken to this court. The only issue to be determined here is whether or not the agreement to furnish gas in said residence was a covenant running with the land, or merely personal, inuring to the benefit of John McLandsborough only. The subject of "covenants running with the land" has elicited a wide range of discussion in this and many other jurisdictions, and in these discussions it has been a subject of much concern whether a covenant concerning a thing not *in esse* will under any circumstances inure to the benefit of or bind the assignee, and, also, whether it was necessary to use the word "assigns" or "heirs and assigns" to make a covenant concerning a thing not *in esse* run with the land. One of the earliest discussions, and possibly the most notable, is found in *Spencer's Case*, 5 Coke, 16, and probably no other has attracted more, if quite so much, attention. This was a series of seven resolutions passed by the judges concerning covenants, and which of them run with the land, and which were collateral, and where the assignee should be bound

without naming him, and where not, and where he should not be bound though named, and where not. The first and second of said resolutions are of interest here. The first reads as follows:

“When the covenant extends to a thing *in esse*, parcel of the demise, the thing to be done by force of the covenant is *quoddammodo* annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee, although he be not bound by express words; but when the covenant extends to a thing which is not in being at the time of the demise made, it can not be appurtenant or annexed to a thing which hath no being. As if the lessee covenants to repair the houses demised to him during the term, that is parcel of the contract, and extends to the support of the thing demised. and is therefore *quoddammodo* annexed and appurtenant to houses. and shall bind the assignee, although he be not bound expressly by covenant.”

In the instant case the covenant concerns a thing which was not *in esse* at the time of the demise made, but to be “newly built after” and therefore would seemingly bind the covenantor and not the assignee, for “the law will not annex the covenant to a thing which hath no being; this, however, is the provision of said first resolution only. The second resolution reads as follows:

“It was resolved in this case that if the lessee had covenanted for him and his assigns that they would make a new wall upon some part of the thing demised, that, for as much as it is to be done upon the land demised, that it should bind the assignee; for although the covenant doth extend to a thing to be newly made, yet it is to be made upon the thing demised, and the assignee is to take the benefit of it, and therefore shall bind the assignee by express words.”

Recognizing the inconsistency in the above resolutions, the courts have been gradually abandoning the position that it was necessary to use the word “assigns” to make a covenant concerning a thing not *in esse* run with the land, and have been coming to regard the intention of the parties, as gathered from the whole instrument, the governing principle, and not the use or meaning of mere technical words. Moreover, it is exceedingly doubtful whether the court so decided in Spencer’s case.

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In the English notes to said case in 15 English Ruling Cases, 244, it is observed that anonymous case in F. More, 159, 300, has been identified and approved as a report of the final determination of Spencer's case. It is there stated that the court held that:

"Notwithstanding that the covenant lacks words (assigns), yet each by the acceptance of the possession has made himself subject to all covenants concerning the land, but not to collateral covenants, and covenants of reparation, etc., * * * are covenants inherent to the land with which the assignee, without special words, shall be charged."

The foregoing seems all the more likely to have been the court's conclusion in view of the observations of Chief Baron Pollock, speaking for the Court of Exchequer in *Minshall v. Oakes*, 2 Hurlst & N., 793, where it is said:

"The explanation may be that Lord Coke is reporting a variety of arguments and opinions expressed, while More gives the ultimate decision."

Attention is also directed to the fact that the resolutions were never acted on, and that according to Moore the decision was the other way in *Smith v. Arnold*, 3 Salk., 4.

Therefore, so far as Spencer's case is concerned, and it is the notable one in all early jurisprudence, it seems safe to say that the use of "assigns" as a technical word is not now nor never has been essential to the running of a covenant with the land at common law.

It is indeed difficult to reconcile the first and second resolutions in Spencer's case, and the conclusion must be that many of the courts have practically repudiated the first by following the second; and that the word "assigns" is not necessary to make a covenant concerning a thing not *in esse* run with the land, and so it is held in *Sexaner v. Wilson*, 113 N. W., 941, the first paragraph of the syllabus of which reads as follows:

"The use of 'assigns' as a technical word has never been essential to the running of a covenant with the land at common law."

The foregoing is in point with the instant case and is somewhat similar as to facts. The covenant related to a division fence which was not shown by the testimony to be in existence at the time of the execution of the deed, and yet it was held that the word "assigns" was not necessary to create a covenant running with the land.

Again in the case *Doty v. Railway Co.*, 53 S. W., 944, it is held that:

"A deed conveying a right-of-way for a railroad in consideration of five dollars and an agreement by the grantee to run daily passenger trains on and along the right-of-way, with provision that, if it is abandoned for non-user for six months, title shall revert to the grantor, contains a covenant running with the land as to the running of trains, though the road was not built when the deed was made, and the word 'assignee' is not used; so that a purchaser of the road is liable thereon for a breach subsequent to the purchase, though there had been breach of the covenant before the transfer."

The foregoing is similar in principle with the case at bar and somewhat similar as to facts. And holding squarely to the same effect is *Denman v. Prince et al*, 40 Barbours, 213; *Teachout v. Capital Lodge I. O. O. F.*, 104 N. W., 440; *Norman v. Wells*, 17 Wend., 149, 150, 153; *Beddoe's Ex'r v. Wadsworth*, 21 Wend., 120; *Bally v. Wells*, 3 Wils., 25; and in *Masury v. Southworth et al*, 9 O. S., 341, it is held in the third paragraph of the syllabus as follows:

"3. When such a covenant to insure has for its object a building to be erected after the date of the lease, but which, when erected, is to be used by the lessee, and is an essential ingredient in the agreement of the parties for the creation of the estate, it is not indispensable to make such a covenant run with the land that 'assignees' should be expressly named; but the covenant being one which may be annexed to the estate, and run with the land, equivalent words, or a clear intent shown by the whole instrument, may suffice."

The foregoing is supported by the later case of *Huston v. R. R. Co.*, 21 O. S., 236. This was an action to appropriate private property for railroad purposes; after a jury had been

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impaneled all claim for damages for fencing was withdrawn from the consideration of the jury, upon the agreement of the company to make convenient crossings and forever maintain fences along said right-of-way across said premises. The land owner conveyed said property to another who, in turn, conveyed to still another, and said railroad was sold to another company, which refused to maintain said fences. The court held in the second paragraph of the syllabus:

"2. It is an agreement which runs with the land, so as to be binding between the assignees or grantees of both the parties thereto," and yet the word "assigns" or "heirs and assigns" was not used.

Numerous other cases might be cited in support of the general proposition, and while it is true that some courts have elected to follow the first resolution in Spencer's case, yet a greater number by far have elected to follow the second.

In determining whether a covenant runs with the land the material inquiries are:

1. Whether the parties meant to charge the land, and
2. Whether the burden is one that can be imposed consistently with policy and principle.

And it is so held in the above case of *Sexauer v. Wilson et al*, 113 N. W., 941, second paragraph of the syllabus.

In the instant case John McLandsborough received but one dollar consideration for said right-of-way; beyond question the real consideration was the gas to be furnished for *one* fire and *two* if more gas was procured, and this "in the residence of John McLandsborough." Not *to* or *for John McLandsborough*, but in the residence; therefore, the name "John McLandsborough" is descriptive of the residence in which the gas was to be furnished. Wherefore, the contention that John McLandsborough being dead, the obligation was discharged, is not justified.

The intention of the parties in the instant case as disclosed by their conduct is of some value here in construing their contract; the gas was furnished by the Ohio Gas Company in said resi-

dence until the death of John McLandsborough; after his decease to his son Seigel; then by the American Gas Company, the successor of the Ohio Gas Company, to Seigel, and later to Ina J. McLandsborough Johnson, and until last May without a question; the parties so construed this contract themselves and the case of *Mosier et al v. Parry*, 60 O. S., 388, is applicable. The first paragraph of the syllabus reads as follows:

"1. Where the language of a contract is of doubtful import, it is proper to ascertain the circumstances which surrounded the parties at the time it was made, the object intended to be accomplished, and the construction which the acts of the parties show they gave to their agreement, in order to give proper construction to the words they have used in the instrument, and to determine its legal effect."

Likewise the case of *Kling, Admr., v. Bordner*, 65 O. S., 86, is well in point. Also *New Pittsburg Coal Co. v. N. Y. Coal Co.*, 31 C. D., 458, the second paragraph of the syllabus of which reads as follows:

"Evidence showing the practical construction which either party has placed upon a coal mining contract and the acquiescence therein by the other party, may be considered for the purpose of aiding in its proper construction."

In harmony with the foregoing is *M. E. Church Society v. Ashtabula Water Co.*, 10 C. D., 648, and another case worthy of notice in this connection is *Railway Co. v. Porter*, 12 N.P.(N.S.), 353. Resting the interpretation of the contract upon the conduct of the parties, it is conclusively shown that they understood the covenant as to free gas to be one running with the land.

Second. Is the burden one that can be imposed consistently with policy and principle? As above observed the pecuniary consideration for said "right-of-way" was one dollar. It could not be successfully maintained for a moment that this, within itself, was a full and fair consideration for the enjoyment of said right by said company or its successors and assigns so long as they might care to use it. In fact, the intention as gathered from said contract is exactly to the contrary, because the cove-

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nant as to free gas is inserted, which no doubt was then recognized by all parties as the real consideration. The one dollar, being merely nominal, negatives the theory that it was the principal consideration or that it was so considered by the parties, whose conduct clearly indicates that they understood it to be a covenant running with the land. And so it is observed by Welch, C. J., speaking for the court in the above case of *Huston v. Railway Co.*, beginning at page 246, as follows:

“Does the contract run with the land? Undoubtedly it does. It was an agreement to erect structures upon the land appropriated, and to keep them up so long as that was enjoyed.”

That is to say, that so long as the right-of-way was used or enjoyed the fences were to be maintained. It is also provided in said agreement that the Scio Gas Company, its successors and assigns, shall have the right to enter said premises at all times to repair and maintain said gas lines; thereby all the rights granted originally to the Ohio Gas Company were saved to its successors and assigns; why not likewise to the owner of the freehold, which carries the burden of the easement and which the gas company is insisting it shall continue to carry? It is only fair and reasonable that free gas be furnished in said residence so long as said right-of-way is enjoyed. And such obligation may be consistently imposed upon the defendant company or its assigns while it continues to exercise such right. When the defendant company purchased said “right-of-way” it necessarily acquired it subject to all the conditions imposed and by its acceptance of the contract was bound by the conditions thereof; and so it is held in *Hickey v. Railway Co.*, 51 O. S., 40, the first paragraph of the syllabus reading as follows:

“1. That the grantee, by accepting the deed, will be deemed to have entered into an express undertaking to perform the condition contained in the deed, and such undertaking will run with the land, and become obligatory upon a subsequent owner by purchase from the grantee of the company.”

Likewise it is held in *Railroad Co. v. Priest et ux*, 31 N. E., 77, and so it is held in the anonymous case, F. Moore, 159, 300, as

above quoted, and where it is said that acceptance of possession makes one liable for all covenants except collateral.

The defendant company knew or is charged with knowledge of this covenant relating to free gas, because said contract is a matter of record in this county (Lease Record 11, pp. 113, 114), and it was the purchaser of said right-of-way from the Ohio Gas Company.

In 11 Cyc., 1080, there is a helpful discussion of "covenants running with the land" in which it is observed:

"In order that a covenant may run with the land, that is, that its benefit or obligation may pass with the ownership, it must respect the thing granted or demised, and the act covenanted to be done or omitted must concern the land or estate conveyed."

Further discussion will be found at pages 1051 and 1081. The instant case comes well within the above definition.

Further discussion is superfluous here, in view of the fact that for eighteen years free gas was furnished in the said John McLandsborough residence by the Seio Gas Company and its successor, the defendant here, during the occupancy of John McLandsborough and that of his son, and until recently that of his daughter; the defendant company took said right-of-way with a full knowledge of the conditions; it is still using it and must be bound thereby. The word "assigns" is not necessary or essential in order to make a covenant run with the land, and judgment must therefore be entered for plaintiff.

FARR, J., concurs.

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"FURNISHING" INTOXICATING LIQUOR IN DRY TERRITORY.

Court of Appeals for Wayne County.

LAZARUS BAYSINGER v. STATE OF OHIO.

Decided, May, 1918.

Prosecution for Providing Beer for Privileged Persons—In Territory Made "Dry" Under the Beal Law—Provision for Such a Supply is in Violation of the Statute.

The keeping in the basement of a private house in dry territory of kegs of beer, with permission to certain persons to visit said basement and draw and consume the beer so provided, constitutes a furnishing of intoxicating liquor within the prohibition of the statute, and a conviction of the occupant of the house, who ordered the beer and collected the money for its payment from those who visited the place, will not be disturbed by a reviewing court.

A. D. Metz, for plaintiff in error.

Benton G. Hay, Prosecuting Attorney, and *T. W. Orr*, contra.

HOUCK, J.

Error to the Common Pleas Court of Wayne County.

The plaintiff in error was tried and convicted of keeping a place for the unlawful furnishing of intoxicating liquors as a beverage. The same is alleged to have been done in the village of Rittman, Wayne county, Ohio, and which village at the time was "dry territory," having been made so by a local option election.

To the judgment of conviction, by the mayor of said village of Rittman, the accused prosecuted error to the common pleas court, and the same being affirmed, error is here prosecuted seeking a reversal of the judgment of said courts.

The record discloses the following undisputed facts:

The village of Rittman is dry territory, by reason of a local option election. On Saturday evening, August 18th, 1917, the sheriff of Wayne county, with a search and seizure warrant, visited the home of Baysinger, and in the basement of the home

seized four eight-gallon kegs of beer, a beer pump and some beer glasses and buckets. At said time and place there were eight persons (including the accused) present, either in the room or just on the outside, and some were drinking beer.

In the basement where the beer was found there was nothing else stored except the four kegs of beer, with ice on them, and a long bench with beer glasses on it. One of the kegs had a beer pump in it. That several times a week during the summer of 1917, and prior to August 18, people would go to said basement, singly, and sometimes four or five at a time, and during this time a drayman was seen, on several occasions, unloading beer there, the number of kegs delivered being from one to five at a time, and this was as often as three times a week during the aforesaid period.

The beer, on all these occasions, was purchased by those who visited the basement, each paying his proportionate share of the cost. Baysinger usually collected the money and ordered the beer, and all deliveries were made to him, and drunk by the contributors in the basement of the Baysinger home. The basement door was left open when beer was there, and the contributors were privileged to, and some of them did, visit the place and drink beer on their way home from work, and at other times, when Baysinger was not present.

The question presented to the court is: Under these facts and the law, was the accused properly convicted?

The conviction was had under favor of Section 13232, General Code, which reads:

“Whoever, after thirty days from the date of an election held within a municipal corporation to determine by ballot whether the sale of intoxicating liquors as a beverage should be prohibited therein, a majority of votes at such election having been cast in favor of prohibiting such sale within such municipality. in any manner directly or indirectly, sells, furnishes, gives away, or otherwise deals in intoxicating liquors as a beverage or keeps or uses a place, structure or vehicle, either permanent or transient, for such selling, furnishing or giving away or in which or from which intoxicating liquors are so sold, given away, furnished or otherwise dealt in, shall be fined not less than fifty dollars nor more than two hundred dollars, and for a second of-

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fense shall be fined not less than one hundred dollars nor more than five hundred dollars, and for each subsequent offense shall be fined not less than two hundred dollars and imprisoned not less than ten days nor more than sixty days."

Counsel for plaintiff in error maintains that the conviction was wrongful, and not warranted under the facts and law, because the accused had a legal right to associate himself with others in the ordering of beer, and the mere fact that they drank the same on the premises of the accused two or three times a week, during the summer of 1917, and the further fact that it was in his home or private residence, would not constitute, in law, a keeping of a place for the furnishing of intoxicating liquors unlawfully.

This claim might have some force if our Legislature had not spoken, and clearly and fully disposed of same by statutory provision.

Section 6099 reads:

"In clubs, societies or other combinations of individuals where intoxicating liquor is kept for use of as a beverage by individual members thereof in territory where the sale, furnishing or giving away of intoxicating liquor as a beverage is prohibited, the keeping of such place shall be held to be the keeping of a place where intoxicating liquors are furnished or given away in violation of the local option laws."

Section 6102 reads:

"In a territory in which the sale, furnishing or giving away of intoxicating liquor as a beverage is prohibited, the keeping of intoxicating liquor in a room, building or other place, except in a regular drug store or in a *bona fide* private residence, shall be *prima facie* evidence that such liquor is kept for unlawful sale, furnishing or giving away."

So far as this case is concerned, the Legislature of our state, by the above enactments, has saved the courts much work and labor by clearly defining the elements necessary to constitute the offense of keeping a place for the unlawful furnishing of intoxicating liquors. The language used is not ambiguous, and needs no interpretation, but is plain and explicit.

The accused might not have known of these provisions of our law, or he might have failed to properly interpret same, but it matters not, as a failure to know the law excuseth no one for its violation.

It seems to us that the crux of this case centers in the proper definition of the word *furnishing*, as found in the statutes hereinbefore referred to, and as thus interpreted, when measured by the conceded facts in this case, how stands the issue as between the State of Ohio and Lazarus Baysinger?

The Supreme Court of this state has said that the supplying of intoxicating liquors to a minor, to be drunk by him, is a furnishing of the liquor to such minor, although it was purchased by another, and supplied by the seller to the minor in pursuance of such purchase.

The facts in this case abundantly show that while no liquors were sold, and while the proof does not in so many words indicate that any was given away to other than the persons who assembled there from time to time, yet it is clearly proven that Baysinger furnished the place, secured the beer, and made it possible for the men to congregate quite frequently in the basement of his home, and there they drank beer on numerous occasions.

By reason of this, his home—in law—had been transformed into a public resort, where persons were permitted to congregate “in dry territory,” and by so doing attempted to set aside the wishes of the residents of the village of Rittman, who had heretofore by a majority vote at a local option election said, as provided in Section 13232, General Code, that, “whoever, within such municipality, in any manner directly or indirectly, sells, furnishes, gives away, or otherwise deals in intoxicating liquors as a beverage, or keeps or uses a place, structure or vehicle, either permanent or transient, for such selling, furnishing or giving away, or in which or from which intoxicating liquors are sold, given away, or furnished or otherwise dealt in, shall be fined,” etc. * * *

If we are to be guided by the language thus used in the above legislative enactment, and in doing so give to the word “furnishing” its commonly accepted meaning, we are unable to find other than the courts below in this case.

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The word "furnishing" is broad and comprehensive in its scope and meaning, and in so holding we are only carrying out the legislative intent of the law makers who enacted the statute in which it is used.

The statutes relating to the violation of local option laws, like all criminal statutes, were passed to be enforced, and the will of the people in voting "territory dry" must be held sacred, and violators thereof must atone to the offended law, if under the facts and a proper application of the law to same, they are found to be such violators.

In our examination of the testimony and evidence, as contained in the bill of exceptions, and a review of the entire record before us, we find no errors of a prejudicial character that would justify a reversal of the judgment of conviction entered in this case.

Judgment affirmed, and case remanded for execution.

POWELL, J., and SHIELDS, J., concur.

COMPENSATION FOR PROSECUTOR IN MUNICIPAL COURT.

Court of Appeals for Butler County.

STATE, EX REL PRIMMER, CITY SOLICITOR, V. BOARD OF
COMMISSIONERS OF BUTLER COUNTY ET AL.*

Decided, November 27, 1914.

*Prosecution of Criminal Cases in the Municipal Court of Hamilton—
Compensation Therefor.*

1. It is the duty of the city solicitor of Hamilton to act as the prosecuting attorney of the municipal court of that city.
2. It is the duty of the county commissioners to make a proper allowance to the city solicitor for his services in state cases before the Municipal Court of Hamilton.

*Affirmed, *County Commissioners v. State, ex rel Primmer*, 93 Ohio State, 42.

B. F. Primmer, City Solicitor, for plaintiff in error.

Benj. A. Bickley, Prosecuting Attorney, contra.

JONES (OLIVER B.), J.

This is an action to compel the board of county commissioners to make an allowance of compensation to the city solicitor for his services as prosecuting attorney of the Municipal Court of Hamilton.

There is no question that the municipal court has the jurisdiction of a police or mayor's court, and in our opinion Section 4306, General Code, and Section 1579-122, General Code (103 O. L., 353), make it the duty of the city solicitor of Hamilton to act as the prosecuting attorney of such court, and under the terms of Section 4307, General Code, he "shall receive for this service such compensation as council may prescribe, and such additional compensation as the county commissioners shall allow."

In our opinion it is the duty of the county commissioners by virtue of this section to make a proper allowance to the city solicitor for his services as prosecuting attorney in state cases before the Municipal Court of Hamilton. In making this allowance they can take into consideration the amount of compensation he receives for city cases, and the extent of the services rendered in both city and state cases.

The court below was, therefore, in error in sustaining the demurrer of defendants below to the petition for mandamus, and the judgment will be reversed and the case remanded for further proceedings.

SWING, J., and JONES (E. H.), J., concur.

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**LIABILITY TO ADJOINING PROPERTY OWNER WHERE AN
EXCAVATION IS CARRIED MORE THAN NINE
FEET BELOW THE CURB.**

Court of Appeals for Hamilton County.

SOPHIA ULLAND V. THE FOSS-SCHNEIDER BREWING COMPANY.*

Decided, July 15, 1916.

Excavation—Liability Arises Without Regard to Care and Skill in Making—Where the Excavation is Carried More than Nine Feet Below the Curb and Adjoining Property is Injured Thereby—Continuing Nature of the Liability—Owner of Lands Within a Flooded District Subject to the Same Rule—Questions of Fact to be Submitted to the Jury.

1. Where the owner of a lot in a municipality excavates and constructs a cellar to a greater depth than nine feet below the curb grade of the street on which such lot abuts and such excavation causes any damage to any wall, house or other building upon the lots adjoining thereto, such owner is liable in a civil action to the property injured to the full amount of such damage without regard to the care or skill with which said cellar may have been constructed or maintained (G. C., 3782).
2. The duty of one who digs such cellar beyond the statutory depth is not only to protect the adjoining property while the work is in progress but during the entire time he continues to maintain such excavation.
3. This rule applies equally to lands within what is known as a flooded district subject to customary periodical overflow from back water from a river at flooded seasons and such conditions must be considered and provided for in the construction and maintenance of the walls and concrete floors of such cellar so as to prevent the passage into it of the soil from under the foundation walls of adjoining structures and their consequent undermining.
4. The question whether the proximate cause of the damages arising from the undermining and collapse of a house was the withdrawal of proper lateral support by reason of the maintenance of an

*For opinion below see, *Ulland v. Foss-Schneider Brewing Co.*, 20 N.P. (N.S.), 375, and for opinion of the Supreme Court see, *Foss-Schneider Brewing Co. v. Ulland*, 97 Ohio State.

adjoining excavation more than nine feet below curb grade or was the result of an extraordinary and unprecedented flood regardless of such excavation, is a question of fact to be determined upon evidence by the jury and is not a question of law to be decided at first instance by the court.

Powell & Smiley, for plaintiff in error.

Bettinger, Schmitt & Kreis, for defendant in error.

JONES (Oliver B.), J.

Plaintiff and defendant were the owners respectively of adjoining parcels of real estate fronting upon the west side of Freeman avenue south of Gest street in the city of Cincinnati. Plaintiff's property consisted of a two and a half story brick building upon a lot 20 feet front lying immediately north of the premises of defendant which fronted in all 192 feet upon Freeman avenue and contained buildings and appurtenances thereto used by the defendant as a brewery.

The cellar of plaintiff's house was a little more than nine feet in depth, and the foundation walls were $1\frac{1}{2}$ feet thick. The cellars of the brewery, extending from Freeman avenue westwardly 102 feet, were of different depths; the one immediately adjoining plaintiff's property was more than 16 feet in depth and, being under what was used as a driveway, was called "the driveway cellar." Immediately adjoining the driveway cellar on the south was a cellar 30 feet in depth, which was divided into a cellar and a sub-cellar, the level of the first cellar being about 14 feet below the sidewalk and about $2\frac{1}{2}$ feet above the level of the driveway cellar. The walls dividing and supporting these cellars were of good masonry, that between the plaintiff's property and the driveway cellar being a 3 foot wall, and that between the driveway cellar and the adjoining thirty foot cellar a $3\frac{1}{2}$ foot wall.

These brewery cellars were used for the purpose of storing beer in large casks. A small gutter ran in the cement floor along the south wall of the driveway cellar towards the southwest corner where it connected with an iron pipe six inches in diameter which ran through the dividing wall and into the sub-cellar

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on the south, emptying into an iron tank which was a large receptacle sunk in the corner of the sub-cellar, being about six feet in depth and twenty feet in circumference, into which all of the brewery cellars above mentioned drained. From this tank, by means of a siphon pump, the water was pumped into the city sewer. Large quantities of water were used in these brewery cellars for cleaning casks and scrubbing floors.

The floors of the brewery cellars were cemented with a layer of cinders and a layer of concrete and then a finished surface of cement, the layer of concrete being thin, as no frost reached the cellars.

The soil underlying plaintiff's property and in the surrounding neighborhood consisted of a sandy loam which extended to a depth of about thirty feet below the surface or curb line of Freeman avenue.

These premises are located in what is known in Cincinnati as part of the "flooded district," being visited from time to time by the flood water from the Ohio river.

In March, 1913, one of these great floods occurred, and on March 30 the waters of the flood rose almost to the curb line of Freeman avenue. Defendant to save its cellars from inundation by water backing up from the sewers closed up the sewer connections in the higher cellar thus keeping the flood waters out of its cellars until the 29th or 30th of March, when it discovered that water and sand was coming through the north wall of the driveway cellar, being the wall adjoining plaintiff's premises, and that there were cracks in said wall from one to four feet above the floor of said cellar, permitting the water and sand to wash into said driveway cellar. On Sunday defendant endeavored to plug up these cracks and holes through which the water and sand were flowing with planks and oakum, but its efforts proved unsuccessful, and the flow of water and sand became so great in volume that the one pump which was ordinarily used for the purpose of pumping water from the tank in said cellar was insufficient, and plaintiff placed other pumps therein and operated the same, for the purpose of preventing the water from flooding its cellars and destroying its beer.

The flow of sand into said cellar became so great as to cause the iron pipe leading from the driveway cellar into the lower cellar to become choked up to such an extent that it was broken off by defendant to permit the water and sand to flow through said drain.

Defendant company continued to operate its pumps on Sunday and Sunday night, and about two o'clock on Monday morning, March 31, 1913, the tenants and occupants of plaintiff's house were awakened by the noise caused by the breaking of the wall of plaintiff's building, and by the suction and falling of bricks and other material into the excavation underneath plaintiff's premises, and they discovered that the yard or passageway of plaintiff's premises lying next north of defendant's property had been undermined and that the cellar walls and the wall of said building had fallen into the excavation. Thereupon defendant was notified through its engineer, who had charge of defendant's property at that time, that the pumping of the water by defendant was undermining plaintiff's property. Defendant's engineer then went to plaintiff's property and inspected it, but refused to stop pumping, as he had orders to prevent the water coming into defendant's cellar. And defendant continued to pump the water and sand out of its cellar until about nine o'clock on Monday morning, March 31, 1913, at which time the building inspector of the city of Cincinnati ordered said pumping stopped. Previous to the stopping of the pumping the floor of the driveway cellar bulged upward and cracks four or five inches wide appeared the entire width of said cellar, and large quantities of sand, loam and debris was forced into said cellar. It was shown that the south wall of plaintiff's house was destroyed and the building damaged and rendered untenable, requiring time and expense to make necessary repairs.

Immediately after the receding of the water defendant made repairs to its north wall of the driveway cellar, adjoining plaintiff's property.

At the close of plaintiff's evidence defendant filed a motion for an instructed verdict in its favor, which was granted and

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such verdict returned. A motion for new trial filed by the plaintiff was overruled, and judgment was entered upon said verdict.

Plaintiff seeks here to secure a reversal of the judgment rendered in the court below, urging that the court erred in overruling the motion for a new trial and in sustaining the motion for an instructed verdict in favor of the defendant.

The theory of defendant, which was adopted by the trial court and upon which a verdict was directed, was that the damages to the defendant were caused by the flood; that the unusual flood should be deemed "an act of God" for which no one would be liable; and that this flood might be regarded as a common enemy of all persons who were or might become subject to the invasion of its waters, and that each owner had the right to make such efforts to prevent damage by the flood as the necessity of the occasion required, subject, however, to the principle that he must regard the rights of his neighbors and not by any negligence of his in protecting himself cause damage to them. The decision is based upon the principle laid down in *Rex v. Commissioners*, 8 Barn. & Cress., 355. In that case the commissioners of sewers for the levels of Pagham had taken down and removed certain groynes and other works which had been theretofore erected for protection against the inroads of the sea, and had constructed other works in their place. The effect of such changes caused the sea to flow with increased force against the land of one Cosens, for which he claimed damages. The decision in effect required the complaining land owner to protect himself by such works as he might find necessary.

The same principle is announced in other cases upon which defendant relies, among which are: *Lamb v. Reclamation Dist.*, 73 Cal., 135; *Hoard v. Des Moines*, 62 Iowa, 326; *Turnpike Co. v. Green*, 99 Ind., 205; *Railroad v. Stevens*, 73 Ind., 278; *Bass v. State*, 34 La. Ann., 494.

This theory, however, is based upon the conclusion that the proximate cause of plaintiff's injury was the flood itself. It leaves out of view the making of the excavation by the defendant and the construction and maintenance of the extraordinarily deep cellars, which plaintiff insists are the proximate cause of her damage.

The right to recover, which plaintiff seeks, is based upon the doctrine of lateral support as amplified and extended by the enactment of Section 3782 of the General Code, which is in part as follows:

"If the owner or possessor of any lot or land in any municipality, digs or causes to be dug any cellar, pit, vault or excavation, to a greater depth than nine feet below the curb of the street or streets on which such lot or land abuts, or, if there be no curb, below the established grade of the street or streets on which such lot or land abuts, or if there be no curb or established grade below the surface of the adjoining lots, and by such excavation, causes any damage to any wall, house or other building upon the lots adjoining thereto, such owner or possessor shall be liable in a civil action to the party injured, to the full amount of such damage."

At common law the owner of land was entitled to have it supported in its lateral state by the land of the adjoining owner, but that right did not extend to require the support of buildings that had been placed upon the land. Ohio, as well as many other states, however, has provided by statute for excavations in municipalities to a reasonable depth for cellars, and for damages to buildings as well as to the land itself for excavations greater than that reasonable depth. The right of the owner of land to natural support is held to be a property right and not a mere easement. *Belden v. Franklin*, 8 C.C.(N.S.), 159; *Burgner v. Humphrey*, 41 O. S., 330; *Joyce v. Barrow*, 67 O. S., 264, 270.

Similar statutes have been sustained in: *Bloomington v. Duffy*, 71 (Misc.), N. Y., 136; *Dorrity v. Rapp*, 72 N. Y., 307; *Regan v. Keyes*, 204 Mass., 294.

In *Keating v. Cincinnati*, 38 O. S., 141, it was held that the right exists as against municipal corporations as well as against individuals, and the city was held liable in the case of an excavation for a street, even though the property injured did not immediately abut upon the street. In the opinion in that case, at page 148, White, J., used the following language:

"It can make no difference in principle whether the property is flooded and the soil washed away, or the property is injured

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and the soil removed from some other cause. It is the injury to the property that gives the right of action; and the author of it is bound to make reparation."

Where the right of lateral support has been invaded liability exists, whether the excavation was done carefully or negligently. The doctrine is well stated in *Jones on Easements*, Section 588:

"The only neglect necessary to give a cause of action is the neglect to furnish proper supports to the land of the adjoining owner to prevent its caving in. The only proof necessary is of the making of the excavation and of the injury to the adjoining land in consequence. It is not incumbent on the plaintiff to show that the excavation was made by the defendants in a careless, negligent or unskillful manner.

"Though one in excavating and removing the soil on his own land has not conducted the work negligently or in a manner contrary to the custom of the country, he is liable to his neighbor for any injury to his land occasioned by such excavation.

"Where one, by digging on his own land, causes the adjoining land of another to fall, the actionable wrong is not the excavation, but the act of allowing the other's land to fall. It is the wrong to the right of property that attaches to the right of lateral support. Hence the measure of damages is the diminution of the value of the land by reason of the falling of the soil, and it is immaterial whether this falling be called 'caving' or 'washing,' provided it is the natural and proximate result of removing the lateral support."

And Section 591:

" * * * The artificial support substituted in place of the natural support of the soil may be of any material, provided it is sufficient for the purpose, and it is continued so as to maintain the land in its proper condition.

"One can not escape liability for an injury caused by insufficient support by showing that the support was a reasonable or customary support, or that the excavations were made with care and skill. It is simply requisite that the support shall prove to be sufficient and effectual."

The case of *Cahill v. Eastman*, 18 Minn., 324, while not altogether turning upon the question of lateral support is instructive

as bearing upon the instant case. It states in the syllabus the general doctrine, as follows:

"The common right of each, is not to be injured in his property by the way in which another uses his.

"Where it is sought to make one accountable for the consequences of acts done by him upon his own land, the question, in general, is not whether he exercised due care, but whether his acts caused the damage. If they necessarily tend to injure his neighbor in his pre-existing rights of property, he is liable in damages for the natural and necessary consequences thereof, irrespective of any considerations as to the care and skill with which such operations may have been conducted."

See, also: *Ulrick v. Dakota, L. & T. Co.*, 51 N. W. (S. D.), 1023; *Gildersleeve v. Hammond*, 67 N. W. (Mich.), 519; *Mears v. Dole*, 135 Mass., 508.

It is contended by the plaintiff that the cause of the damage was the existence of these deep cellars constructed by the brewery, together with the fact that the walls and bottom of same were not sufficiently tight and strong to prevent the passage of the soil and sand in its semi-fluid condition into these deep cellars from beneath the shallower cellar of the plaintiff.

It would appear that if all the cellars had been of the same depth, say nine feet, there would have been no such injury to plaintiff notwithstanding the flood, even though the defendant had plugged up the openings of the cellar where they connected with the sewer and had kept the water pumped out, because then merely the water in plaintiff's cellar might have passed into defendant's cellar but it would not have carried out the sand and soil under the footings of plaintiff's wall or disturbed her foundations in any way. Nor, in all probability, would any injury have resulted if the defendant had allowed the water to accumulate in its cellars to the same level as that in the plaintiff's cellar, for the hydrostatic pressure of the water on both sides would have prevented the disturbance of the soil and sand under the foundation of plaintiff's house.

In ordinary cases the defendant would have an undoubted right to prevent the water coming into its cellar if it were able

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to do so, and also to pump out any water that did run in. But where, as claimed in this case, defendant has made unusual excavations and constructs cellars to an unusual depth, far below that fixed by statute, and has failed to so construct and maintain them as to preserve the lateral support to the adjoining structure of its neighbor because of such pumping out of the water and the consequent removal and running out of the sand and soil from under the neighbor's foundations, then the result would be as disastrous and of the same character as though in the original excavation plaintiff's wall had not been protected but had been suffered to fall into the excavation.

The mere fact that the wall itself stood can not excuse defendant, so long as it allowed soil and sand to pass through its interstices or to pass under its footings by bulging up and breaking the floor of the deep cellar, thus withdrawing the sand and soil from under the foundations and accumulating it in defendant's cellar.

The duty of one who digs such a cellar beyond the statutory depth is not only to protect the adjoining property while the work is in progress, but during the entire time that he continues to maintain such excavation. The right of a land owner to have his land and buildings sustained while an excavation was being made and a cellar constructed far beyond the statutory depth would be of slight value if only requiring them to be supported during the construction. And the mere fact that the adjoining wall continued to stand up would be of little value if his sub-soil had been allowed to slide or percolate into his neighbor's pit, and his building consequently demolished. A case directly in point is *Bernheimer v. Kilpatrick*, 53 Hun., 316.

Nor is there any difference in the rule of lateral support where, as in this case, the soil which has been withdrawn consists of a fluid mixture of sand and loam so blended with the water as to be inseparable from it. *Columbus v. Willard*, 7 C. C., 113; affirmed 54 O. S., 615.

Under the evidence offered by the plaintiff in this case she was entitled to have the case submitted to the jury to determine whether the damages to her property resulted because of the ex-

istence to an unusual depth of defendant's cellars, and its failure to prevent the removal or withdrawal of her sub-soil during its operations in pumping out the water.

In our opinion the court erred in withdrawing the case from the jury and directing a verdict. The judgment is therefore reversed and the cause remanded for a new trial.

JONES (E. H.), J., and GORMAN, J., concur.

PROSECUTION OF A FERTILIZER COMPANY.

Court of Appeals for Warren County.

THE HARVEYSBURG FERTILIZER CO. v. STATE OF OHIO.

Decided, August 12, 1915.

*Nuisance—Maintenance of, Alleged Against a Fertilizer Company—
Election Between Counts—Joining of Distinct Offenses—Jury Need
Not be Directed to Return Special Findings—Criminal Law.*

1. Reviewing courts will allow a rather wide discretion to trial courts in the matter of compelling an election between different counts of one indictment.
2. As a general rule distinct offenses may be joined in different counts of the same indictment, either where they arise out of and are connected with the same transaction, or where they are connected with the same subject-matter.
3. Where there is a plea of not guilty in a criminal case, the court is not required to direct the jury to return special findings or answer interrogatories, and this is true as well where the defendant is a corporation.

*Brandon & Ivins and Willis Bacon, for plaintiff in error.
Frank C. Anderson, contra.*

JONES (E. H.), J.

The plaintiff in error was indicted for maintaining a nuisance. As its name indicates, it is engaged in the business of manu-

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facturing fertilizer from the carcasses of dead beasts, its plant being located at Harveysburg in Warren county, Ohio. The indictment contains three counts. The first count of the indictment alleges that "by reason of the boiling and drying of the flesh and entrails of beasts at said place and in said buildings as aforesaid divers noisome and offensive smells during the time aforesaid, were occasioned, so that the said place, buildings and business becomes injurious to the health, comfort and property of the persons there residing, to the common nuisance of all the people of the state of Ohio there lawfully being and abiding, and to the common nuisance of all persons lawfully being upon and passing along the public highway located by and contiguous to the said place and buildings." The second count alleges that "the said the Harveysburg Fertilizer Company did at the time aforesaid and at the place aforesaid unlawfully receive and cause to be received the bodies of dead beasts and deposited and caused to be deposited said dead bodies at said place in plain view of persons passing along and over the public highway located along and contiguous to said property of the said the Harveysburg Fertilizer Company, and unlawfully did permit said bodies there to remain until by reason of their decomposition they gave off noisome and offensive odors during the time aforesaid, so that the said place and business became injurious to the health, comfort and property of the persons there residing, to the common nuisance of all the people of the State of Ohio there lawfully being and abiding, and to the common nuisance of all the people passing over and along the public highway located along and contiguous to the property of the said the Harveysburg Fertilizer Company." And the third count of the indictment states that the said fertilizer company "unlawfully and purposely did corrupt and render unwholesome and impure a certain water-course then and there being and flowing unto and through the said county of Warren and known as 'Caesar's Creek' by putting offal, filth and noxious and offensive substances into said water-course to the damage and prejudice of other persons residing along said water-course in said county of Warren."

To this indictment the defendant filed a demurrer and motion to quash, both of which were overruled by the trial court, and exceptions were taken. Thereupon the case came on for trial before a jury which found the defendant company guilty upon the first and second counts of the indictment, and not guilty upon the third count. Judgment was entered upon this verdict assessing a fine for each offense, and ordering an abatement of the nuisance found by the jury to exist.

Several alleged errors are pointed out by counsel for the plaintiff in error. After the jury had been impaneled and sworn, a motion was made by defendant to require the state to elect upon which count of the indictment it would proceed to trial. The court overruled this motion, and its action in so doing is claimed to be error.

We think the authorities cited in the brief of plaintiff in error upon this point do not support its contention, but on the other hand show that the court was correct in overruling said motion.

In *Bailey v. State*, 4 Ohio St., 441, it is held:

"Several distinct offenses may be joined in different counts of the same indictment, as a general rule, either where they arise out of, and are connected with, the same transaction, or where they are connected by the same subject-matter."

The first proposition of the syllabus in said case holds:

"Where an indictment charges two or more offenses, arising out of distinct and different transactions, the court trying the cause may require the prosecutor to elect upon which charge he will proceed; but the action of the court, in this respect, being a matter of discretion, can furnish no ground for a writ of error."

Without citing further authority, it seems to be the policy of reviewing courts to allow a rather wide discretion to trial courts in the matter of compelling election between different counts in one indictment. The case of *Stockwell v. State*, 27 Ohio St., 563, and *Bainbridge v. State*, 30 Ohio St., 264, are cited by counsel for plaintiff in error, but have no application here, since the question there determined arose from indictments contain-

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ing only one count, the evidence however having a tendency to prove two or more offenses.

The second error assigned is that the court refused to allow the jury to answer twenty interrogatories propounded by the accused. It has been held in this state that Sections 5200 and 5201, Revised Statutes (now Section 11463, General Code), have no application in criminal cases. (See *Smith v. State*, 59 Ohio St., 351.) The claim that this case is taken out of the rule there laid down, by its being *quasi*-civil, we think is not well founded. The plea here was one of not guilty, the same as in other criminal cases, and the Supreme Court held expressly in the *Smith case*, above cited, that where there is a plea of not guilty the court is not required to direct the jury to return special findings or answer interrogatories.

We have examined the special charges requested by defendant which the court refused to give, and find no error in the court's action. Without entering at length upon a discussion of those charges we might state that they are all subject to the objection that they are drawn upon the theory that a person upon trial for a crime may establish his innocence by proving some one else has been guilty of the same offense.

The fourth error urged in the brief we think is answered by our holding to the effect that it was right for the court to order the trial to proceed upon the three counts of the indictment. If the defendant can be tried upon two or more counts, the jury had a right, if warranted by the evidence, to find the defendant guilty upon one or two of said counts, and the court had the duty to pass sentence and enter judgment upon the verdict so found.

The fifth assignment of error is stated as follows: "The court erred in not directing a verdict for the accused." It is urged in this connection that there is a variance between the proof and the indictment, in that the indictment charges that the stench was created by "boiling and drying the flesh and entrails of the beasts," while the evidence, it is claimed, shows that there was no boiling and drying but that the cooking was produced by the application of steam. We have read the opinion of

the trial court upon this question, delivered in passing upon the motion for a directed verdict, and approve what the learned judge there said. Section 13582, General Code, fully meets this objection, and is as follows:

“When, on the trial of an indictment, there appears to be a variance between the statement in such indictment and the evidence offered in proof thereof, in the christian name or surname, or both or other discription of a person therein named or described or in the name or description of a matter or thing therein named or described, such variance shall not be ground for an acquittal of the defendant, unless the court before which the trial is had, finds that such variance is material to merits of the case or may be prejudicial to the defendant.”

There was no error in the court's refusal to require an election by the prosecutor after the close of the evidence. Such action of the court would have been proper and necessary had more than one offense been proven under an indictment containing but one count. The trial court correctly passed upon this question at the beginning of the trial, as we have before found, and the motion made at the close of the evidence was not well taken.

Finding no error in the proceedings, the judgment of the common pleas court will be affirmed.

SWING, J., and JONES (Oliver B.), J., concur.

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Butler County.

ACTION IN MANDAMUS NOT APPEALABLE.

Court of Appeals for Butler County.

STATE, EX REL WELCH, V. DENEEN, DIRECTOR OF
PUBLIC SAFETY, ETC.

Decided, November 22, 1915.

*Jurisdiction on Appeal—Not Defeated by Failure to Note Filing of
Appeal Bond on Appearance Docket—Proceedings in Mandamus
May be Reviewed on Error Only.*

1. The notation of the filing of an appeal bond on the appearance docket is not jurisdictional, and when an appeal bond is given within the statutory period a failure to make a notation thereof on the appearance docket at the time it is given does not affect the appeal.
2. The amendment of the Constitution of Ohio, providing for the organization and jurisdiction of the court of appeals, has excluded a statutory proceeding such as mandamus from the cases which can be reviewed in the court of appeals on appeal, and when such review is desired it must be had by error proceedings.

Clinton Egbert, for plaintiff.*B. F. Primmer*, contra.

JONES (OLIVER B.), J.

This case is heard on a motion to dismiss the appeal. Two grounds are urged: the first, that the judgment having been entered June 29, 1915, and the appeal bond filed September 29, 1915, the said bond was filed more than thirty days after the judgment was entered, and Section 12226, General Code, was not complied with and the appeal must, therefore, be dismissed.

The transcript filed with the papers herein shows that the appeal bond was given June 30, 1915, and then approved by the clerk in accordance with the statute, but it appears that the clerk failed to note the giving of this bond upon the appearance docket or mark it as having been filed until September 29, 1915. The jurisdictional requirement of Section 12226 is that

the undertaking should be given, and that appears to have been done in this case. Of course it should be noted upon the appearance docket at the same time it is given, but such notation does not appear to be jurisdictional.

The second ground urged for dismissal is that under the terms of Section 6, Article IV of the Constitution as amended, this case is not appealable, as it is not equitable in its nature and is not a chancery case.

Prior to the amendment of the Constitution cases in mandamus were appealable to the circuit court. (*Dutton v. Village of Hanover*, 42 Ohio St., 215, and *State, ex rel, v. Philbrick*, 69 Ohio St., 283.) The statute would still seem to permit such an appeal, if it alone were to be considered; but the amendment to the Constitution providing for the organization and jurisdiction of the court of appeals has excluded a statutory proceeding such as mandamus from the cases which can be reviewed in the court of appeals, and such review when desired must therefore be had by error proceedings.

The motion to dismiss will be granted.

JONES (E. H.), J., and GORMAN, J., concur.

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Wood County.

ABSENCE OF MOTIVE FOR COMMISSION OF A HOMICIDE.

Court of Appeals for Wood County.

CHARLES NEISWENDER V. STATE OF OHIO.

Decided, November 10, 1915.

Criminal Law—As to Special Requests to Charge the Jury—Confusion of Issue by a Multiplicity of Requests—Failure to show Motive—Statements by the Accused Distinguished from Confession of Guilt—What Should be Left to the Jury—Tender of Incompetent Evidence and the Evil Resulting Therefrom—Jury as a Whole, and Not Individually, Should be Convinced Beyond a Reasonable Doubt Before Verdict is Returned.

1. In a prosecution for homicide, the absence of any evidence tending to show a motive for the alleged crime is a circumstance to which the attention of the jury should be directed by the court with the instruction that this fact should be considered in connection with the evidence and other circumstances of the case in determining the guilt or innocence of the accused.
2. While the statute relative to the giving of special written instructions to the jury before argument applies to civil cases only, the substance of such a request, where embodying a correct statement of the law, should be incorporated in the general charge of the court.
3. Where it is claimed that statements made by the accused are in a measure admissions of his guilt, the trial judge should leave to the jury the question whether such statements were made, and if made whether they amounted to an admission of guilt, care being taken not to designate the statements as a confession of guilt.

B. F. James and Earl D. Bloom, for plaintiff in error.

E. K. Solether, Prosecuting Attorney, and Charles S. Hatfield, contra.

KINKADE, J.

The plaintiff in error was charged, in the indictment returned by the grand jury, with having committed the crime of murder in the second degree by the killing of his father-in-law, William Edward Dindore, on the morning of December 13, 1913.

A plea in abatement was filed by the accused and met by a demurrer on the part of the state. The demurrer was sustained. After a very careful examination of all that is claimed by the accused in support of this plea we are of the opinion that the action of the trial court in sustaining the demurrer was correct.

After a very long trial the jury returned a verdict finding the plaintiff in error guilty of manslaughter under the indictment mentioned. Motion for a new trial was overruled and judgment and sentence of the court followed pursuant to the verdict. A very large number of errors are assigned as necessitating a reversal of this judgment.

In the view that we take of the evidence in the case, we think it unnecessary to review in this opinion all of the claimed errors or to even mention more than a few of them specifically. The record embraces several hundred pages of evidence and a very large number of exhibits, including two maps exhibiting the scene of the tragedy and the territory thereabouts.

Over two hundred exceptions were taken during the trial by counsel for the accused with respect to rulings upon evidence, requests to charge and otherwise by the trial judge.

The case was very fully and very ably argued, both orally and in printed briefs, by counsel for the accused and for the state. On account of the great importance of the case we have devoted a large amount of time to the reading and careful study and comparison of the evidence and have read with great care every syllable of evidence in the case and examined all the requests to charge and the general charge and the exhibits.

Speaking of those things that took place at the trial to which our attention has been called by the plaintiff in error and which we deem of sufficient importance to justify special mention, we refer to request to charge, number 37, presented by counsel for the accused, which reads as follows:

“The court further instructs the jury that when the evidence fails to show any motive to commit the crime charged, on the part of the accused, this is a circumstance in favor of his innocence. And in this case if the jury find, upon careful examination of all the evidence, that it fails to show any motive, on the

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part of the accused, to commit the crime charged against him, then this is a circumstance which the jury ought to consider in connection with the other evidence in the case in making up their verdict."

This request was refused by the trial judge and an exception noted. We think this is a correct statement of the law and that this, or the substance of this request, should have been embodied in the general charge, and that the omission so to do was error prejudicial to the accused.

All of the requests to charge offered by counsel for the accused were asked to be given before argument. The statute relative to giving, before argument, written requests presented by counsel, applies to civil cases and not to criminal cases. *Umbenhauer v. State of Ohio*, 2 C. D., 606 (4 C. C., 376), affirmed by the Supreme Court, without report, March 4, 1890, 23 Bull., 176.

This decision has been several times followed by this court. However, we think the request, presented as it was prior to the general charge of the court, should have been covered thereby as stated, and we are of the opinion that the language of the court found on page 7 of the general charge did not sufficiently cover that object. It was conceded in argument in this court that the record contained no evidence of any motive on the part of the accused to commit the crime charged. That being true, we think the charge would have been in better form had the court stated the fact to the jury that there was no evidence in the record tending to show any motive, and then have stated to the jury what the law was in a criminal case notwithstanding the fact that there was no evidence tending to show motive.

In view of the fact that sixty-six requests to charge were presented in this case we think the attention of counsel should be called to the case of *American Steel Packing Company v. Conkle*, 86 O. S., 117. In any criminal case a very few requests, carefully drawn, should be amply sufficient to cover every possible question of importance in the case, and the giving to the jury of numerous requests, in addition to the general charge,

puts an unwarranted element of confusion into the minds of the jury. We heartily approve of the rule laid down by the Supreme Court in the case cited.

We find in the general charge of the court on page 13 the following language:

“The court further instructs the jury that the confessions of the accused out of court are a doubtful species of evidence and should be acted upon by the jury with great caution, and unless they are supported by some other evidence tending to show that the accused committed the crime, they are rarely sufficient to warrant a conviction. But confessions, however, may and should be taken into account by you with the other evidence in the case, and observing the caution of the court as to the effect of such evidence relating to confessions, you should give it such weight as you think it is entitled to receive.”

Evidence was offered on behalf of the accused tending to show that no confession had been made by the accused to one Richard Smith. The court very properly excluded this evidence, on the motion of counsel for the state, for the reason that no evidence had been offered by the state that any such confession ever took place. In the argument of the case in this court it was stated by counsel for the state that they did not claim, either in the trial court or in this court, that any confession had been made by the accused. In view of this position taken by the state, and the state of the evidence in this record, we think the language of the court quoted from the general charge was not an accurate statement of the law and that the court was not justified in using the word confession in the relation there used, which was susceptible of being understood by the jury as a statement from the court, that the court was of the opinion that there was some evidence in the case of some kind of a confession.

Quoting from the *Encyclopedia of Evidence*, Volume 3, pages 297 and 298, we think this is the correct statement of the law:

“A confession is a voluntary admission of guilt of a criminal offense. They are distinguished from admissions in civil cases

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and from admissions of fact in criminal cases tending to prove the offense charged but not amounting to a confession of guilt. To constitute a declaration a confession within the legal meaning of the term, it must amount to a confession of the crime charged or participation in such crime as distinguished from the admissions or other statements tending to prove guilt or innocence or of facts from which, taken together, guilt is directly deducible."

If it be claimed that statements by the accused are in a measure an admission of his guilt or are indicative of his guilt, the trial judge, where the evidence is in dispute as to whether the statements were made and if made whether they amount to a confession, should leave the question to the jury as to whether the statements were made, and also the question as to what, if made, their effect was in establishing the issue in dispute, and the trial judge should not designate such statements, if any there be, as a confession.

In some of the requests to charge and at more than one place in the general charge the jury were instructed that each juror must be satisfied from the evidence, beyond a reasonable doubt, in order to find the accused guilty, or else the accused must be acquitted. This form of instruction was disapproved by the Supreme Court in the case of *Davis et al v. State*, 63 O. S., 173, where it is said:

"The proper charge to a jury in a criminal case is, that the jury and not that each juror, should be convinced beyond a reasonable doubt of the guilt of the accused before finding him guilty."

The charge as given in this respect was, of course, not prejudicial to the defendant, but we call attention to the matter in view of our disposition of the case.

It was claimed on the trial by counsel for the accused that he had the right to show that when he was visited by various county officers and others in connection with investigations made about the homicide, that he then disclosed to them all that he knew on the subject, and evidence was offered tending to show

the fact of such disclosures. This evidence was rejected by the court on motion of the state and an exception saved. Evidently the ruling of the court was based upon the fact that no evidence had been offered by the state tending to show any refusal of the accused to answer inquiries put to him or give such information as was within his possession with respect to the homicide, and, consequently, the state making no such claim against him, there was no propriety in his showing that he had not so refused. It is entirely clear that if the accused, in the absence of any such evidence as I have indicated on behalf of the state, were permitted to travel over numerous interviews had with other persons and show in detail the inquiries that were made of him and that he answered them all, etc., an issue involving almost an endless amount of time would be brought into the case. The defendant being attended by the presumption of innocence and only required to answer that which the evidence of the state tended to establish as wrong conduct on his part, we think the action of the trial court was correct in excluding the character of evidence referred to.

The accused was inquired of by his counsel whether he had ever been in trouble before. The question was objected to and excluded by the court and an exception saved. We think the question was too general in this form and that the action of the trial court with respect to it was correct. We are not meaning by this to say that the accused might not have been inquired of by his own counsel as to whether he had ever been guilty of any breach of the peace, or whether he had ever been convicted in any court as a violator of the law. It was also entirely proper for the accused, if he saw fit to do so, to show by competent proof what his general reputation was in the neighborhood in which he resided, with respect to whether he was a peaceable and law-abiding citizen or not, and this might be shown by the accused whether the state had offered any evidence touching these points or not. What has been said in this respect rests upon the well known principle that a man of good reputation in any respect is less likely to have violated the law in that respect than one of vicious tendencies along the same lines.

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We call attention to one feature of the trial which is not claimed by the plaintiff in error to present prejudicial error against him but which we think is worthy of comment, and that is the letter from the deceased, Edward Dindore, to his son, every page of which was identified by the evidence of the son as being in the handwriting of Edward Dindore and was said to have been received, in due course of mail, sealed up, by the son to whom it was addressed. If the state had no evidence to present concerning this letter except what the record discloses they did present, then manifestly the letter was clearly incompetent.

The ruling of the court excluded the letter on the showing made by the state with respect to it was unquestionably correct, but it does not follow in many instances that no prejudice arises to the party against whom a piece of evidence is tendered simply by reason of the fact that it is excluded from the jury on his motion. The jury are not acquainted with the technical rules of evidence and when a witness is offered on one side of a trial who is clearly disqualified to testify, or when a piece of documentary evidence is offered that is clearly incompetent as the record stands, the presentation of the witness or the document, associated with the necessary objection from the other side, may well raise in the minds of some of the jury at least a suspicion that the witness or the document offered would have disclosed something detrimental to the party objecting had the objection not been made. It was not contended in this court in argument that the letter in this case was competent. It was only hinted that had it been admitted it might have furnished some evidence of motive on the part of the accused. We think before the letter was offered in the presence of the jury, at least, counsel by his professional statement should have made it reasonably certain to the trial judge that further proof showing the competency of this letter would be offered in due time. In view of the importance in criminal trials that attaches to the presence or the absence of motive as an incident of the crime, and particularly in cases where the evidence is largely circumstantial, we think care should be observed in offering evidence

of doubtful competency to see that no situation is presented that is likely to produce an unwarranted impression upon the minds of the jurors. Very wide latitude must rest with the trial court in matters of this character, and we are not indicating any particular rule that should be followed. All that we mean to say is that in respect to the letter in question we think something further should have come from the counsel offering it with respect to additional evidence to establish its competency before it was offered in the case. What has been said with respect to this letter is said without any knowledge on the part of this court of the contents of the letter, as it is not attached to the bill of exceptions.

Our attention is called by counsel for plaintiff in error to several rulings of the court on motions to withdraw from the consideration of the jury evidence that had been admitted without objection, these rulings being claimed as errors. We think it is sufficient to say, in general, covering all instances of this kind in the record, that it is not correct practice for counsel to permit evidence claimed by him to be incompetent to be placed before the jury without objection and then move the court to strike it out. When evidence is believed to be incompetent on any ground and counsel wish to have it excluded from the consideration of the jury, the proper practice is to object to it when it is offered, and save an exception there to the ruling of the court if the ruling is not satisfactory to counsel.

We are not, of course, meaning by what is said in this respect, to cover instances where witnesses answer before counsel have an opportunity to object. In such case the only course open to counsel is to move to strike out the incompetent answer that has thus come in.

The conclusion that we have reached with respect to the evidence makes it wholly unnecessary to discuss all of the grounds stated in the motion for a new trial.

And lastly, we come to the most important question in the case, and that is the sufficiency of the evidence to sustain the verdict returned and the judgment entered thereon.

It has long been the uniform practice of this court when reversing a case on the ground that it is not sustained by suffi-

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cient evidence to omit entirely any detailed discussion of the evidence, and this for the reason that on a re-trial the evidence may not be the same and a discussion of the evidence by the reviewing court might give to one side or the other an unfair advantage in the re-trial of the case. Therefore, although we have spent several days in the examination of this evidence, and although it would be perfectly easy at this time to discuss the whole record in this respect in detail, for the reasons stated, and for the further reason that such discussion would unwarrantably prolong this opinion, I will state only the conclusion we have unanimously reached, and that is, that the verdict and judgment are not sustained by sufficient evidence.

We find no other errors in the record sufficiently prejudicial to the accused to justify a reversal, but for the error of the court in refusing to give, in substance, in the charge to the jury the matter contained in request number thirty-seven, hereinbefore quoted, and in refusing to grant a new trial to the plaintiff in error on the ground that the verdict and judgment were not sustained by sufficient evidence, the judgment of the court of common pleas will be reversed and the cause remanded for new trial.

RICHARDS, J., and CHITTENDEN, J., concur.

**ACCEPTANCE OF CHECK "IN FULL OF ACCOUNT"
OF UNLIQUIDATED CLAIM.**

Court of Appeals for Hamilton County.

BETTMAN ET AL V. SPORKIN ET AL.

Decided, March 22, 1915.

Accord and Satisfaction—Effect of Acceptance of a Check—"In Full of an Unliquidated Claim."

When there is a *bona fide* controversy existing between two parties regarding the amount due on an unliquidated claim, and the debtor sends to the creditor a check, upon which appears the words,

"In settlement of account in full," and the creditor receives this check and retains the same and uses it, there is an accord and satisfaction and the creditor can not recover any additional amount on account of such claim.

Joseph W. O'Hara, for plaintiffs in error.

Matthews & Matthews, contra.

GOERMAN, J.

The action below was brought by Sporkin Brothers & Company, defendants in error in this case, to recover from the plaintiffs in error, Bettman, Cohen & Company, a balance amounting to \$931.56, claimed to be due on an account.

The original account was for goods sold and delivered by the defendants in error to the plaintiffs in error, and amounted to something like \$17,000, all of which had been paid except the balance claimed. There was attached to the petition an itemized account.

The answer of the defendants was a general denial, after admitting the respective partnerships of plaintiffs and defendants; and by way of second defense set up full settlement of the account by accord and satisfaction, in this, to-wit, that on October 24, 1910, a check was sent to the plaintiffs for \$1,553.31 and endorsed thereon, on the body of the check, were the words, "In settlement of account in full"; that this check was sent in a letter which contained an itemized statement of a corrected account of the transactions between the plaintiffs and the defendants.

Upon the trial of the case below a verdict was rendered in favor of the plaintiffs for \$516.76, which sum included interest from the time claimed up to the first day of the term. Deducting the interest, the verdict represents \$472.10, and this sum represents the aggregate of two items of invoices claimed to have been sold and delivered by the plaintiffs to the defendants: one, July 15, 1910, \$254.75, and the other, August 20, 1910, for \$217.35.

The evidence in this case adduced at the trial shows that some time prior to September 26, 1910, a dispute and contro-

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versy arose between plaintiffs and defendants concerning the quality of the goods sent by the plaintiffs to the defendants, the amount of discount which should be allowed, and the question of the receipt of some goods, and other matters. On that day, September 26, 1910, a member of the plaintiff firm came from Philadelphia to Cincinnati and had a conference with Mr. Bettman of the defendant firm, after which it was agreed between the parties, and the agreement reduced to writing, that of the 625 suits of clothes held by Bettman, Cohen & Company, and shipped by the plaintiffs, 325 suits were to be taken back by the plaintiffs and credit given by the plaintiffs to Bettman, Cohen & Company for them; and it was further agreed that Bettman, Cohen & Company would pay the rest of the account at once after the return of the goods, deducting $4\frac{1}{2}$ per cent. discount upon the whole account, instead of payment upon the original terms. The goods were sent back, 325 suits, and on that day \$2,000 was paid to the plaintiffs, and, later, \$2,000 more was sent to the plaintiffs. The defendants wrote to the plaintiffs to send an account, but no account was sent; and the evidence does not disclose that up to this time any account had ever been rendered by the plaintiffs for goods sold up to the 26th day of September, 1910.

The defendants not having received an account, finally, on October 17, 1910, sent a letter to the plaintiffs in which they "again request a complete statement so that we can mail you check." On October 8th the defendants had written to plaintiffs remitting the \$2,000 and asking them to send a correct and complete statement of the account, crediting the goods returned, and stating that upon receipt thereof the defendants would mail check. (See Exhibit 3.) On the 20th of October the plaintiffs sent what purported to be a complete itemized account of charges and credits, showing a balance due from the defendants to the plaintiffs of \$3,116.35. Thereupon Mr. Bettman of the defendant company sat down and prepared a contra account, item by item, in which he omitted from the account sent by the plaintiffs, four items: One of July 15, 1910, for \$254.75; one of August 20, 1910, for \$217.35; and two items of

September 17, 1910, one for \$659.25 and the other for \$63.35. Mr. Bettman also in the contra account made deductions for basting, and a great many other items, and marked the deductions upon the itemized account which he made out. There were a great number of these deductions made in addition to the deduction of the four items. He also marked on the bill the credits—cash paid and goods returned; and took credit for $4\frac{1}{2}$ per cent. discount, as he claimed was agreed upon on September 26th. In the letter of the plaintiffs to the defendants containing their account sent October 20, they did not allow $4\frac{1}{2}$ per cent. discount, and claimed that inasmuch as the defendants had not paid promptly, as they said they would, that the $4\frac{1}{2}$ per cent. discount agreed upon on September 26th should not be allowed. Upon October 22, after Bettman had made out this contra account with all the deductions, which showed a balance of \$1,553.31, he enclosed a check with the account, and also a letter to the plaintiffs. The check was payable to the plaintiffs, and in the body thereof contained a statement, "in settlement of the account in full." The letter was dated October 22. The contra account was dated October 22, but the check was dated October 24, and that is the day the check, the account and the letter were sent—Sunday having intervened between the 22d and 24th. In this letter the defendants said:

"Replying to your favor of the 20th instant, we beg to state that when you left here you said that when you received the goods we shipped back to you, you would send us a statement, but you did not do it. We had to write you for the statement. We therefore distinctly hold you to the agreement in regard to the discount and enclose herein a check in settlement of account.

"BETTMAN, COHEN & Co."

The evidence discloses that the check, the letter and the contra account reached the plaintiffs, and there is evidence tending to show that at the time the check was received it contained the endorsement above referred to. Furthermore the jury, in answer to an interrogatory, found as a matter of fact that the check when received by the plaintiffs did contain the above endorsement, "in settlement of account in full," so that it is

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established in this case that the check was received in that condition. The plaintiffs banked the check, and after it had gone through the clearing house and been collected they then made a further demand upon defendants for some \$1,600. Subsequently they admitted that from the \$1,600 the two items of September 17, aggregating \$722.60, should be deducted, because the defendants never received the goods charged.

Upon the trial of the case, upon the conclusion of all the evidence, counsel for the defendants requested the court to give the following special charge, which the court refused to give:

"If the jury should find that on October 24th, 1910, there was a controversy existing between the plaintiff and the defendant regarding the amount due from the defendant to the plaintiff, and that the defendant sent to the plaintiff a check, upon which appeared the words 'In settlement of account in full' and that the plaintiff received this check and retained the same and used it, then I charge you that there was an accord and satisfaction in this case, and the plaintiff can not recover, and the defendant is entitled to a verdict."

We are of the opinion that under the evidence in the case it was shown that there was a controversy between these parties on the 24th of October, 1910, when the check was received, and prior to that time. The question of discounts was in dispute, the question of the four items was in dispute, the question of the charge made for bastings, etc., was in dispute, and when the account was sent by the plaintiffs setting out all these charges and items and was received in Cincinnati by the defendants, and the defendants took up that account and made out what they claimed to be a corrected account and forwarded that to the plaintiffs with a check for the balance shown, with the words quoted above endorsed thereon, and that account with the letter and the check went to the plaintiffs, they were chargeable with notice of the fact that the defendants disputed the correctness of their itemized account sent on October 20; so that when the plaintiffs took the check they took it with full knowledge that the defendants were disputing the correctness of their account and were tendering the check in full payment and satisfaction of

the account. We are therefore of the opinion that the court erred in refusing to give this special charge.

We think that there was error in the general charge of the court in this, to-wit, that the court (Record, page 74) used the following language in his charge:

"If you find by a preponderance of the evidence that it did contain these words 'in full settlement of account in full' when it was received by the plaintiffs in Philadelphia, then you will go further and consider whether it was in payment in full of the account enclosed by the defendants with the check, or whether it included in payment in full of the entire account between these parties, and if you find that it was in payment on the account that was enclosed by the defendants to the plaintiffs, then the plaintiffs would be entitled to recover whatever balance of the account they had against the defendants, should you find that they are entitled to anything. Should you find it covered the whole account as presented between these parties, your verdict will be for the defendants, provided you find there is a *bona fide* dispute after September 26th and that these words were in the check when it was received by the plaintiffs. If you should find the check was only in payment in full of the account enclosed with the check, which was sent with the check by the defendants, then you will consider the other items not included in the account sued on by the defendants. These items, as the court remembers, are the shipments of July 15th and August 10th of two cases of goods. If you find they were not included in the check, then if they were ordered by the defendants from the plaintiffs and plaintiffs shipped them to the railroad company and they were received by the railroad company, they would be the property of the defendants and they would be liable for the amount and your verdict would be for the amount of the goods."

We think this charge had a tendency to mislead the jury into finding in favor of the plaintiffs on the items of July 15 and August 20, 1910.

The jury, upon a special interrogatory submitted to them, found against the plaintiffs and in favor of the defendants on the question of the endorsement on the check, and this being true, we are of the opinion that it was the duty of the court, after the return of the verdict, to have granted the motion of

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the defendants to enter a judgment in favor of the defendants, notwithstanding the verdict, and that the facts in the case were such that the defendants were entitled to a verdict.

We think the law point in this case has been settled by our Supreme Court in the case of *The Seeds Grain & Hay Co. v. Conger*, 83 Ohio St., 169, the syllabus of which reads as follows:

"1. When there is a *bona fide* dispute over an unliquidated demand and the debtor tenders an amount less than the amount in dispute, upon the express condition that it shall be in full of the disputed claim, the creditor has but one alternative; he must accept the amount tendered upon the terms of the condition, unless the condition be waived, or he must reject it entirely, or if he has received the amount by check in a letter, he must return it.

"2. Where in such case the creditor retains a check which was sent upon the condition that it shall be in full satisfaction of the debt claimed to be due, and receives the money thereon and notifies the debtor that the amount is placed to his credit, but that he does not intend that the same shall close up the matter in dispute, to which the debtor makes no reply, such silence by the debtor does not amount to a withdrawal of the condition which accompanied the tender, nor a waiver of it. The transaction is an accord and satisfaction."

See also *Brown-Ketcham Iron Works v. Hazen et al*, 4 C.C. (N.S.), 582. In this decision of the circuit court of this county the court held:

"The law in Ohio as to accord and satisfaction does not differ from that of other states or of the federal courts in that, where a liquidated sum is due, the acceptance of a draft for a less sum in satisfaction thereof is binding as in full satisfaction, notwithstanding a want of full satisfaction."

This rule of course applies to an unliquidated claim such as the one in the case at bar.

To the same effect are the cases of *C., M. & St. P. Ry. Co. v. Clark*, 178 U. S., 353, and *Ostrander v. Scott*, 161 Ill. 339.

Counsel for defendants in error, plaintiffs below, have cited several authorities to the effect that the dispute must exist before the tender of the payment is made in order to constitute the

payment of a smaller sum an accord and satisfaction of the larger sum claimed. Even if this be true, the court is of the opinion that in the case at bar there was a controversy and dispute between plaintiffs and defendants in this case with reference to this account, and inasmuch as there was but one account, there was no room for difference as to what account was in dispute. It was the account which the plaintiffs had against the defendants. The defendants had no account against the plaintiffs, and the memorandum sent by the defendants through Mr. Bettman was a restatement of the plaintiffs' account as the defendants claimed it should be.

For the reasons stated herein we are of the opinion that the judgment of the court of common pleas should be reversed and this court should enter a judgment in favor of the defendants, as the court of common pleas should have done on the motion for judgment *non obstante veredicto*.

Judgment reversed, and judgment for plaintiffs in error.

JONES (E. H.), J., and JONES (Oliver B.), J., concur.

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REGULATION OF PUBLIC LAUNDRIES.

Court of Appeals for Cuyahoga County.

YEE BOW V. CITY OF CLEVELAND ET AL.

Decided, July 15, 1918.

Validity of Municipal Ordinance—Providing for the Licensing of Public Laundries—Definition as to What Shall Constitute a Public Laundry—Vesting of Judicial Power in a Health Commissioner—Complainants Relegated to a Less Drastic Remedy than the Invalidating of the Whole Measure.

1. An ordinance providing for the licensing and regulation of public laundries is not open to constitutional objection because of the inadequacy of indefiniteness of the definition contained therein of public laundries, where the class which it is sought to designate is described as laundries serving thirty or more customers per week for pay.
2. Nor is such an ordinance rendered invalid by the delegation to the health commissioner of authority to determine what shall constitute adequate ventilation or plumbing.
3. But even were it granted that such an ordinance contains some provisions in excess of the power granted to municipalities with reference thereto, there is ample opportunity in a court or elsewhere to invoke relief without resort to so drastic a remedy as the securing of a decree declaring the whole measure void.

Boyd, Cannon, Brooks & Wickham, for plaintiff in error.

Alfred Clum, contra.

DUNLAP, J.

This cause is here on appeal from the judgment of the court of common pleas, and is a suit brought by the plaintiff, a citizen, resident and tax-payer of the city of Cleveland, engaged in the laundry business. It is brought on behalf of himself and all tax-payers of the city and all others engaged in the laundry business.

Complaint is made that a certain ordinance Number 42256, entitled "An Ordinance Providing for the Licensing and Regu-

lation of Public Laundries," which became effective May 1st, 1917, is an abuse of corporate power and unconstitutional, being in violation of Sections 1, 2 and 19 of Article I, and Section 26 of Article II of the Constitution of Ohio, and of Section 8 of Article I of the Constitution of the United States.

The prayer of the petition is for an injunction restraining the defendants from enforcing said ordinance or any part thereof. To this petition a demurrer is filed and the question for our determination is the sufficiency of the petition.

A copy of the ordinance is of course before us, being attached to the petition. Its provisions will only be incidentally referred to in this opinion.

No technical question involving the propriety of the proceedings or the relief sought is raised, and we shall treat the case as involving simply the questions of the reasonableness and constitutionality of the ordinance.

The able brief of plaintiff concedes the power of the city of Cleveland to regulate the public laundry business as a means of public safety, thus distinctly and obligingly narrowing the inquiry, and urges only two main grounds or reasons for his claims that the ordinance is unreasonable and unconstitutional.

The first of these grounds is that "the definition of 'public laundry' is purely arbitrary, artificial and unreasonable." Section 1 of the ordinance provides:

"Any building, structure, place, premises or establishment, which is used for the purpose of laundering wearing apparel, table or bed linen, curtains, rugs, towels, or any or all of said articles for thirty or more owners of such articles per week, and for pay, regulated either by a flat-rate, piece price, or by weight, shall be deemed a public laundry for the purpose of this ordinance."

It must be obvious that an ordinance pretending to regulate public laundries should contain a definition of such a laundry; should explain what constitutes a public laundry, and such definition from the very nature of things, unless it is to include the humble home of every poor washwoman, must

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be more or less arbitrary. That is to say, a line of demarkation must be drawn between the public and the private laundry. Is it the number of the customers that is to determine? Or is it the character and quality of the work? Perhaps the *very* wise Legislature would adopt a definition which partook somewhat of both of these ideas. Thus it might be possible to have a wiser definition, one which would perhaps embrace a laundry which had many less than thirty customers, and basing the right of regulation upon the amount of work done rather than the number of customers, or perhaps with equal propriety it could be based upon the fact of the employment of a certain amount of help, providing all the time the idea of its being a public laundry was kept in mind. Any one or all of such provisions might wisely and properly be in this definition. There would still be an exception created in favor of the home of the poor washwoman, which may be the one thing that this ordinance intended to exempt from its operation. We are not claiming that a definition so amended would be ideal. We are not even claiming that it would be better or more practical than the definition contained in this ordinance. What we mean to say is that it is not in human experience for a legislative body to adopt the very best and wisest ideas upon its first attempt to enact a complicated but concededly wise regulative ordinance. Such laws must be started and watched and amended as occasion may arise and necessity decree. The very idea of a "public laundry," however, carries with it the idea of an unlimited number of customers. It could hardly be said that a laundry which was under contract to serve only certain customers was a public laundry, but even such a laundry comes within the provisions of this ordinance if its contracts exceed thirty. It can not then lay claim to privacy. And so it is apparent that the most natural basis for the determination of whether a laundry is public or private is that of the number of customers, and not the other considerations which we have so gratuitously offered. This proposition, if one granted, narrows the particular question we are now considering. Surely the number may as well be thirty as any other arbitrary number.

It is a number that amply protects the home of the poor wash-woman from the visits of the health commissioner and his deputies, and yet which probably forces every person in purely public laundry business to look well to his surroundings to see that he complies with the law.

So far as we are aware legislation of this kind even though somewhat arbitrary has been nearly uniformly upheld. The principle is well stated by Mr. Justice Field in the case of *Barbier v. Connolly*, 113 U. S., 27, as follows:

"Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

We are cited by the plaintiff to certain Ohio cases, which it is contended are in support of this particular objection to this ordinance, but we do not quote them here, for we think the provisions of the enactments questioned in them are clearly to be distinguished from the provisions of the ordinance in question. We think that the following authorities are more or less in point and that they are against the contention of plaintiff: *Marmet v. State*, 45 O. S., 63; *Toledo v. Brown*, 14 C.C.(N.S.), 165; *Welch v. Swasy*, 193 Mass., 364; *St. Louis v. Bircher*, 7 Mo. Ap., 169; *Felgum v. Nashville*, 8 Lea (Tenn.), 635; *Cobb v. Durham County*, 122 N. C., 307; *Hubbell v. Higgins*, 148 Ia., 37.

In our opinion the definition of "public laundry" as contained in this ordinance sufficiently meets the requirements of our Constitutions, both state and national, and is a reasonable definition. We therefore find no valid objection to this ordi-

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nance for this reason, and we pass to a consideration of the second ground, which is that—

“The ordinance grants legislative and judicial power to an administrative officer.”

It is argued that because certain sections of this ordinance provide for approval by the health commissioner before the license may issue, and that because such approval can only be obtained if the location, the construction, the ventilation, the floor space and the sanitary drainage arrangements are sufficient to properly protect the public health and the health of the persons to be employed in such proposed laundry, that thereby there is delegated to him judicial powers and perhaps legislative powers; that he is left to be the sole judge of what shall constitute “adequate ventilation,” “adequate plumbing,” etc., and that the delegation of such powers is in contravention of the Constitution of Ohio. We are not inclined to go deeply into this question. It is apparent that rules are laid down in this ordinance for the guidance of the health commissioner in many of the particulars requisite for the conduct of the lawful laundry, and these rules he must obey, and with regard to them it will hardly be contended that this ordinance is unconstitutional. The most that can be said for this contention is that there are some matters, such as “adequate plumbing,” “adequate ventilation,” upon which he passes with either judicial or legislative power. It would be improper for us in the present case to pass upon the validity of all these sections, for even if we found some invalid and in contravention of the Constitution, we would not be justified thereby in holding the ordinance as a whole invalid. The doctrine of sustaining the valid part of legislation in spite of what is known as “partial invalidity” of such legislation is too well settled in Ohio for such action upon our part. We are not conceding that the passing on “adequate plumbing” and “adequate ventilation” is the exercise of a power forbidden by the Constitution, but even if such concession had been made, we are firmly of the opinion that the provisions of the ordinance granting this power to the health

commissioner are not so interwoven into the fabric of the whole ordinance as to be unseparable or that their separation would invalidate or destroy the entire ordinance.

In our view at the present time and for the present case it becomes immaterial that there are or may be some unconstitutional provisions in this ordinance. It would perhaps be surprising if there were none. We are convinced that the ordinance has enough of validity about it, enough of virtue in it to be entitled to a trial. If in carrying out the provisions of this ordinance occasion should arise for individual complaints, there is ample opportunity in a court and elsewhere to adjust such differences without the drastic action sought by plaintiff's petition.

The demurrer to the petition will be sustained and the cause dismissed at plaintiff's costs.

GRANT, J., and LAWRENCE, J., concur.

**INADMISSIBILITY OF A MEMORANDUM WHICH HAS FAILED
TO REFRESH WITNESS' MEMORY.**

Court of Appeals for Hamilton County.

CINCINNATI TRACTION CO. v. MAY HACKETT.

Decided, May 24, 1915.

Evidence—Memorandum Which Has Failed to Refresh Memory of Witness—Inadmissible as Substantive Evidence—Book Account Distinguished from Records of an Incident.

Where the memory of a witness as to an event has failed and a memorandum made by him soon after the event and relating thereto is offered as substantive evidence, his testimony being that it was made by him but he has little or no recollection of the event, the memorandum is inadmissible unless it is shown to have been virtually co-incident with the event, and this is especially true where the memorandum is one which was procured in view of possible Hti-

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gation with reference to the matter to which the memorandum refers.

Kinhead & Rogers, for plaintiff in error.

Hackett, Yeatman & Rover, contra.

GORMAN, J.

This is a proceeding in error to reverse a judgment of the court of common pleas. The defendant in error, May Hackett, recovered a verdict and judgment against the plaintiff in error, in the court below, for the sum of \$750, on account of personal injuries claimed to have been sustained by her on or about November 22, 1908, because of the sudden jerking of a car from which she was alighting as a passenger near Eighth and John streets in Cincinnati.

Two grounds of error are claimed by plaintiff in error in its brief. The first is abandoned because of the decision of the Supreme Court, adverse to its contention on this point, in the case of *Brogan v. Cincinnati Trac. Co.*, 91 Ohio St., 403.

This leaves but one ground of error to be considered by this court, to-wit: error of the trial court in refusing to admit in evidence a written and printed statement made by a witness the day after the accident occurred.

The record discloses that the defendant, for the purpose of showing that the plaintiff attempted to alight from the car before it had come to a stop and while it was in motion, offered as a witness, Edward Pestrop, who testified that he was on the rear platform of the car on November 22, 1908, when plaintiff was alighting from the car. He remembered the day of the month and that it was Sunday at about 7:30 P. M. and near the corner of Eighth and John streets that the accident occurred. He was then asked:

“Q. Tell the jury what you remember about it, won't you?”

To which he replied:

“A. That is about all I remember. I don't remember seeing the woman get off or don't remember only what I have said on

that statement there; that was my information of it at the time, the day after the accident."

He was then shown a statement consisting of printed questions, some of which were answered, and others not answered, in the handwriting of the witness and signed by him, purporting to have been made November 23, 1908, the day after the accident. The paper had been sent to him that day by the defendant, with the request that he fill in as many blank spaces as possible on the opposite side of the sheet of paper. The blank spaces filled in were in the handwriting of the witness. Among other questions and answers thereon were these three:

(Printed.) "Was the car standing or moving? If moving, how fast?"

(In witness's handwriting.) "Was moving slowly."

(Printed.) "If there was anyone injured or any property destroyed, please state extent of same."

(In witness's handwriting.) "A woman fell while leaving the car."

(Printed.) "What in your opinion was the direct cause of the accident?"

(In witness's handwriting.) "The woman stepped from the car while it was in motion."

After examining the paper he was asked if reading the paper refreshed his recollection as to whether or not he saw the woman as she stepped off the car or went off the car. He answered:

"No, I don't remember seeing just how she stepped off now."

He was further asked:

"And looking at that paper, that does not bring it back to your mind?"

"No, sir," he answered.

He said he saw the woman on the ground as she was being assisted to the sidewalk. He was then asked if the statement was in his handwriting, and replied "yes." He was asked if the statements made on the paper were correct. Objection was interposed and sustained by the court. To which ruling of court

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counsel for defendant excepted and offered to show by the witness, if he were permitted to answer, that they were correct. Counsel for defendant then offered the paper in evidence. Objection was made and sustained, and an exception taken. The paper is attached to the bill of exceptions and made a part of the record. There were witnesses who testified that the car had come to a stop and as plaintiff was in the act of alighting it was suddenly started with a jerk, throwing her from the car. There were other witnesses who testified that she attempted to alight before the car had stopped and while it was in motion. The jury answered a special interrogatory that the injury was not caused by the manner in which the car was brought to a stop near John street.

Was it error for the court to exclude this paper?

We think it was not. The only statement in the paper which can be claimed to aid the cause of the plaintiff in error is the one in answer to the question as to the witness's opinion as to what was the direct cause of the accident. The question as to the opinion as the witness as to what was the direct cause of the accident was clearly objectionable, and if the witness had been asked that question directly, while on the stand, it would have been the duty of the court to sustain the objection. How then can it be claimed that the witness's opinion may be secured indirectly by admitting a paper in which he states his opinion as to the direct cause of the accident, when it could not be obtained directly from him while under oath upon the stand? The paper could not be admitted without admitting this objectionable question and answer, and therefore the entire paper was properly excluded on this ground. It will be noticed that the witness was asked for his opinion as to the cause of the accident; not what was the cause of the accident. His answer was an expression of his opinion as to the cause of the accident. His answer was tantamount to saying: "In my opinion the woman stepped from the car while it was in motion." The next question on the paper, which he failed to answer, was: "Give a full account of the accident as witnessed by you," etc. Furthermore, on the stand he testified that he did not remember seeing the woman get off the

car. This further bears out the conclusion that in his answer to the question as to his opinion he was merely giving his opinion, and not stating as a fact that she had stepped off the car while it was in motion.

Furthermore, we are of the opinion that this paper, which could be treated in no other light than as a memorandum made by the witness not at the time of the accident, but the next day, could be used only for the purpose of refreshing his recollection or memory, if it could be used for that purpose, which is doubtful in view of the fact that it was not made until the next day. There are authorities, and some of them are cited by counsel for plaintiff in error in their brief, which hold that, while a court will not receive as evidence a memorandum which has served to refresh the recollection of a witness, yet, where after reading it a witness testifies that he has no recollection of the facts therein stated, but that the memorandum was made by him at a time when the events recited were fresh in his recollection and is correct, such memorandum is admissible. An examination of these authorities will disclose that these are cases of book accounts, or transactions kept in the usual course of business and required to be kept in the course of business by the person making the memorandum or entries. But where the memorandum is prepared or made by the witness at the instance of an interested party, as in this case it was, the court will not admit the memorandum in evidence or allow it to be used by the witness to refresh his recollection. 5 Jones, Evidence, Sec. 879, and I Wharton, Evidence (3d Ed.), Sec. 523.

Where, however, the witness's memory of the event is extinguished, and the memorandum is offered as substantive evidence, he testifying to it as correct, but recollecting nothing as to its contents, then it is inadmissible unless it is shown to be virtually coincident with the event. This is eminently the case when it has been procured in view of litigation. *Steinkeller v. Newton*, 9 Car & P., 313, 315; *Washington Ice Co. v. Webster*, 68 Me., 449, 470; *Church v. Perkins*, 3 T. R., 749, 752, and Wigmore, Evidence, Sections 763, 902-905 (pp. 127, 139, Pocket Ed.).

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In the case of *Steinkeller v. Newton*, *supra*, the witness eighteen months before the trial drew up a paper at the request of the party calling him, and the court would not even permit him to refer to it to refresh his recollection, much less admit it in evidence.

We do not believe that any well-considered case can be found in which a paper such as this, prepared as this was prepared, at the request of a party to the suit, after the accident had occurred and not contemporaneous therewith, has been held admissible. We doubt the propriety of allowing the witness to use it to refresh his recollection, because of the manner in which it was procured—at the request of a party to the suit. However, we do not hold that it was not proper to use it to refresh the recollection of the witness, as it is not necessary to so hold; but we do hold that no error was committed by the court in excluding it as substantive evidence.

There being no other prejudicial error claimed to exist in the record, the judgment of the common pleas court is affirmed.

JONES (E. H.), J., and JONES (O. B.), J., concur.

**RESTORATION OF AN INJUNCTION BY PERFECTION
OF AN APPEAL.**

Court of Appeals for Wayne County.

**THE MASSILLON ELECTRIC & GAS COMPANY V. THE
VILLAGE OF OREVILLE ET AL.**

Decided, September Term, 1914.

*Injunction—Order Dissolving, is Suspended by Perfecting an Appeal—
Contempt of Court—Not a Defense that the Offense Was Due to the
Advice of Counsel.*

1. The perfecting of an appeal by the filing of an appeal bond suspends the order of a lower court dissolving an injunction, and violation of the injunction after the filing of the appeal bond constitutes contempt of court.
2. The plea that parties who are in contempt of court committed the offense while acting upon the advice of counsel, is not a defense but may be considered in mitigation of the offense.

POWELL, J.

In case No. 638 an application was made that several of the defendants named should be cited to show cause why they should not be proceeded against for contempt of court in violation of the injunction allowed in the court of common pleas in that they persisted in doing the things for which they were enjoined immediately after said injunction was dissolved in the court of common pleas, which was done upon the hearing of the case on its merits and before the perfection of an appeal by the plaintiff in the court of appeals.

The statutes provide that an appeal may be perfected upon the dissolution of an injunction within ten days, and that the court dissolving said injunction may suspend its order of dissolution for ten days to allow such appeal to be perfected. This, however, was not done in this case. The dissolution of the injunction was entered as the order of the court on the 21st day of May, 1914, and the appeal bond was filed on the 26th day of May, 1914. Be-

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tween these two dates certain contracts, which the village had entered into for the purpose of erecting an electric light plant, were changed and a large amount of money was paid or agreed to be paid in the construction of said plant pursuant to such change in the contract. Some of these changes were made after the appeal bond had been filed in this court which perfected the appeal.

It is contended that the filing of an appeal bond did not renew the order of injunction that existed in the court of common pleas before the dissolution of such an order. This court is of the opinion that the filing of an appeal bond and the perfecting of an appeal suspends the order of the court of common pleas dissolving the injunction and thereby leaves the same in full force. This was held by the district court of Hamilton county in the case of *Caldwell v. High*, 6 O. D. Re-print, 1037, and the judgment of that court was affirmed by the Supreme Court. The statute exists in practically the same form as it existed when this decision was made, and we hold that from and after the filing of the appeal bond the injunction allowed in the court of common pleas was in full force, and we find from the evidence that the different defendants charged with violating the order of injunction did violate the same. And while they claim that such violation was upon the advice of their counsel, the city solicitor, we think that is not a defense, although it may be considered in mitigation of the actions of the defendants in violating said injunction.

It is the judgment of the court that the charges against the defendants named, constituting the board of public affairs in said village, together with H. D. Shannon, one of the contractors of said village, are sustained, and that each of them should pay a fine of \$25, together with an equal share of any costs made in such proceedings in contempt.

Motion for a new trial, if one is filed, will be overruled and exceptions may be noted.

VOORHEES, J., and SHIELDS, J., concur.

**VALIDITY OF INDEBTEDNESS INCURRED BY A CORPORATION
IN ACQUIRING ITS OWN STOCK.**

Court of Appeals for Hamilton County.

JEROME STRAUSS V. THE IMPERIAL MOTOR CAR COMPANY.*

Decided, March 11, 1918.

Corporations—Defense of Ultra Vires Not Available—In an Action Against a Company for Recovery of Indebtedness Incurred in Purchase of Its Own Stock, When—Estoppel Against the Owner of a Company Deriving a Benefit by Using the Alias of the Company.

The prohibition against a corporation acquiring its own stock, except in satisfaction of a debt or to save it from loss, does not justify the defense of *ultra vires* in an action against the company for foreclosure of a mortgage securing notes given by the company in payment for a block of its own stock, where to sustain such a defense would confer an undeserved benefit upon the owner of the great bulk of the stock of the company. Under such circumstances the virtual owner of the company is estopped from using its alias to set up a plea of *ultra vires* against the notes and mortgage.

Murray Seasongood, for plaintiff.

Johnson & Levy, contra.

BY THE COURT.

This is an action for the foreclosure of a mortgage on real estate and the collection of a debt which represents a consideration of one hundred shares of capital stock purchased by the mortgagor in its own company.

The defense of *ultra vires* is made, and by cross-petition the company seeks to have the notes and mortgage canceled, and offers to return to plaintiff the stock so purchased.

It is undoubtedly the law as sustained by the leading authorities that a corporation can not purchase or acquire its own stock

*Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court, May 28, 1918.

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except in satisfaction of a debt due to it, or under other exceptional circumstances to save the company from loss.

If the transfer of this stock of Jerome Strauss and the making of the notes and mortgage to him by the Imperial Motor Car Company had been challenged promptly by the company itself or its creditors or stockholders, it is questionable whether it could have been sustained; but the situation as presented to the court shows that at the present time John F. Luhrman is not only the president of the Imperial Motor Car Company, but is the owner of almost the entire stock of said company, it being claimed that he owns 109-114ths of the entire stock and that the outstanding shares are held by others for purposes of organization.

The mortgage and notes in question were executed March 4, 1912. The contract for the purchase of 164 shares of stock by John F. Luhrman and Albert H. Luhrman from Harry C. Strauss was made April 4, 1918, and it was based upon a guaranty that said 164 shares constituted a majority of the capital stock of which 320 shares were then outstanding, and that the mortgage indebtedness of said corporation amounted to \$22,800 which, as shown by the statements of the expert accountant made at the time for the purposes of this sale, included the mortgage now questioned.

Said contract further contained a provision that—

“any objection or exception to the condition of the company as being different from the condition set forth in said accountant’s report shall be set up within thirty (30) days or be forever barred.”

It appears that no question was raised as to the validity of these notes and mortgages until the filing of this suit thereon, but on the contrary that the interest was regularly paid thereon by the company under Luhrman’s control on March 5, 1913, March 5, 1914, and March 5, 1915; that accountant’s statements were taken at the end of the years 1912, 1913, 1914 and 1915 respectively, which included among the liabilities of the company this mortgage of \$10,000 to Jerome Strauss; that the capital stock of the company was increased from \$32,000 to \$34,300 by

the issue of \$2,300 additional stock for the purchase of the assets of the Cole Motor Sales Company.

The tender back therefore of 100 shares of stock under the present condition of the company is not an offer to put the plaintiff in the same position that he occupied at the time of the making of the mortgage.

So far as Mr. John F. Luhrman, the real party in interest, is concerned, his purchase of the stock, and his whole connection with the Imperial Motor Sales Company is based upon the validity of the transaction between Jerome Strauss and the company and the existence of the notes and mortgage as its valid debts and obligations.

It would confer an unexpected and undeserved benefit upon Mr. Luhrman, as the present holder of practically the entire stock in the company to hold this mortgage and the notes secured by it to be invalid. Mr. Luhrman is estopped from using the *alias* of the corporation to set up a plea of *ultra vires* as against the notes and mortgage. *State, ex rel, v. Standard Oil Co.*, 49 O. S., 137; *Smith v. Gowan*, 18 C.C.(N.S.), 99, 103; *Old Dominion Copper Co. v. Lewisohn*, 210 U. S., 206; *Norma Mining Co. v. Mackay*, 241 Fed. Rep., syl. 5, (C. C. A. 9).

The notes and mortgage must therefore be upheld as valid under the circumstances of this case, and a decree of foreclosure may be taken in favor of plaintiff.

JONES, P. J., GORMAN, J., and HAMILTON, J., all concur.

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RELIEF AGAINST OBNOXIOUS ODORS FROM A DISPOSAL PLANT.

Court of Appeals for Stark County.

LEWIS F. REIFSNYDER ET AL V. THE CANTON FERTILIZER &
CHEMICAL COMPANY.

Decided, April 1, 1918.

Garbage Disposal—Not Within the Power of the Legislature to Create a Nuisance—Emission of Noxious Odors May be Enjoined.

1. The authority vested in municipalities by the Legislature to contract for garbage disposal does not authorize the creation of a continuing nuisance, which will be a menace to health and an injury to private property; on the contrary the power so granted must be exercised with due regard to the health and comfort of the community and rights of property owners, and where not so exercised injunctive relief may be granted.
2. The fact that a garbage disposal plant, operating under contract with a municipality, is equipped with the most modern facilities and operated with skill and care does not preclude relief from smoke and noxious gases and odors emitted by such plant.

Webber & Turner, for plaintiffs.*Lynch, Day, Fimple & Lynch*, contra.

Houck, J.

This is a suit in equity in which the plaintiffs seek to enjoin the defendant company from operating its garbage disposal plant, located near the city of Canton, Ohio, and say that said plant throws off offensive gases, smokes and odors, which plaintiffs claim are injurious to their health, and further, that their homes, by reason of same, have become and are almost useless.

The pleadings being somewhat lengthy, we deem it necessary in this opinion to set out only such parts as we think essential to a proper determination of the facts and the law in the case.

Plaintiffs' petition avers that—

“said so-called garbage disposal plant so erected by said company, and which is now operating for the so-called disposal of the garbage so delivered by said city of Canton to it, is either totally unfit and unsuited for the purpose of a garbage disposal plant and for the purpose of properly disposing of garbage, or the same has at all times by said defendant company been so unskilfully and inefficiently operated as to cause the same to be so unfit and inefficient. * * * Plaintiffs say that they are not well enough acquainted with the mechanism of a plant of that kind and character to allege or aver as to whether or not the cause of said injuries is by reason of the inefficient operation of said plant, or by reason of the fact that said plant is not adapted to nor is it fit for the purpose of a garbage disposal plant.”

The answer of the defendant denies all of the material allegations of plaintiffs' petition, and affirmatively sets forth—

“that defendant's said plant complained of in plaintiffs' petition was built, and was and is constructed and maintained upon the most modern sanitary and scientific plans, and was and is equipped and operated with the highest degree of care, and with the most modern and improved machinery, mechanism and devices for the elimination and destruction of any and all odors, vapors and gases which may arise in the operation of said plant, or which in any wise may be incident thereto, and that no odors, vapors or gases have arisen therefrom save and except such only as are unavoidable, and are necessarily incident to the conduct of said business by the highest degree of care, and by the most skilled and improved methods, both as to the construction of said plant and in the manner of its operation.”

The defendant, as a further defense, says—

“that on the 6th day of December, 1916, the defendant entered into a written contract with the city of Canton, Ohio, for the erection by defendant of a garbage disposal plant adjacent to its said fertilizing and rendering plant, and for the disposal thereat by defendant of the garbage collected by said city within the limits of said municipal corporation during a period of ten years after said disposal plant was completed and ready for operation. That said contract between said city and defendant was duly made and entered into, and said disposal plant constructed and operated under it, and in accord-

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ance with and as authorized by the provisions of law contained in Section 3809 of the General Code of this state, and under and in pursuance of an ordinance duly passed by the council of said city, on the 27th day of November, 1916, authorizing the making of said contract on behalf of said city. * * * Defendant especially denies that it at any time in the operation of its said plant has caused plaintiffs or any of them any actual, substantial or material injury or annoyance in the use and occupancy of their homes, and avers that in the event the operation of said disposal plant is enjoined and discontinued, such action would result in great and immediate loss and damage to the city of Canton and to the defendant, and would result in great and irreparable injury to the health and welfare of the residents of said city and the community at large."

Counsel for defendant in their printed brief say—

"that the garbage disposal plant in question, having been erected by defendant at a place designated by the city of Canton, under a contract entered into by defendant for the purpose of conserving the public welfare, in pursuance of legislative authority conferred upon the city by Section 3809 of the General Code, its operation can not properly be enjoined, providing the plant is properly constructed, and equipped and operated with the highest degree of care and skill, so as to produce the least possible annoyance."

To this claim we can not and do not assent. While it is true that the Legislature has enacted a law authorizing a city to contract for garbage disposal, yet the Legislature can not authorize the creation of a continuing nuisance, which in effect becomes a standing menace to health, and destroys private property. It seems to us that the power granted by the Legislature to municipalities in this respect is to be exercised with due regard for the health and comfort of a community, and when not so exercised courts of equity will not and should not deny an application for relief until violated private rights have been in some way protected. Does the mere fact that a garbage disposal plant is constructed, equipped and operated with the highest degree of care and skill, so as to produce the least possible annoyance, bar and preclude plaintiffs from the relief

asked by them in their petition, in the face of the fact that the evidence before us clearly shows that the plant as now operated emits gases, smokes, vapors and noxious odors, to the injury of the health of plaintiffs, as well as to the material injury of their property? Certainly not.

The plant may be conducted with as little annoyance as those who operate it can produce, yet does not the law require it to be so operated as not to injure the health of persons living near it? Also that it shall not throw off destructive vapors, causing injury not only to human life but destruction to property as well? There can be but one answer, and that is in the affirmative.

The owner of a garbage disposal plant has a right to send the smoke, vapors and noxious odors from the same into the open air, provided no one is actually injured or annoyed thereby; but such owner has no right to cast off from such plant smokes, noxious odors and unwholesome smells upon his neighbor's home and property, and then plead as a defense that he has done so with as little annoyance and inconvenience as possible. Such owner will not be allowed to manage, control and operate his business according to his own notions of how it shall be done, in total disregard of the health and comfort of his neighbor. A person is bound to use his own property in such way and manner as not to injure the property of his neighbor: therefore a use which produces injurious and destructive vapors, smokes and noxious odors, causing an annoyance to property owners in the neighborhood, is such an annoyance as will authorize a court of equity to act and grant the proper relief.

We must bear in mind that the city of Canton is not a party to this suit, nor is it necessary or proper that it should be. The fact that it made a contract with the defendant in this case to dispose of its garbage does not add to or take from the plaintiffs any of their legal or equitable rights in the premises, and it in no wise creates in the defendant any greater rights in law or equity as to the proper determination of this suit.

Coming now to a brief discussion of what appears to us to be the real question in the case, have the plaintiffs or any of

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them suffered any actual, substantial or material inconvenience or annoyance in their homes, or have any of them been injured in health? This must be determined by the evidence in the case, which consists of more than nine hundred pages of typewritten matter. We have read this testimony with much care and no small amount of labor. Before the plaintiffs are entitled to the relief prayed for in their petition they must establish by clear proof all of their material allegations, as set forth in their said petition. A court of equity is not authorized to grant injunctive relief unless the proof clearly warrants it. We are then led to inquire, how stand the issues of fact in this case? The great weight of the evidence is with the plaintiffs, and they have fully satisfied us that the claim they make is right, and is clearly sustained by the evidence in the case.

After a careful consideration of the whole case we are of the opinion that the plaintiffs are entitled to an injunction restraining and preventing the defendant from operating its said plant in such a way or manner as to cause offensive or noxious odors, vapors, gases and smokes to be thrown off or cast from its plant upon the homes or premises of said plaintiffs, or either of them, to the substantial or material injury or annoyance of the said plaintiffs or any of them.

Decree and judgment accordingly.

POWELL, J., and SHIELDS, J., concur.

**LIABILITY TO ADJUTING OWNER FOR DAMAGE TO
SHADE TREES.**

Court of Appeals for Clermont County.

VILLAGE OF AMELIA ET AL V. HICKS.

Decided, November 10, 1915.

Shade Trees—Abutting Owner May Recover For Unnecessary and Injurious Trimming by the Municipality or its Contractor—Not Necessary in Such a Case that a Claim for Damages Should be Filed Before Suit is Begun.

1. A village and a contractor with such village, for the stringing of wires for supplying electric light for lighting the streets and for commercial purposes, are liable in damages to an abutting lot owner whose trees in front of his property and within the lines of the public highway are injured by being unnecessarily and recklessly trimmed by the employees of such contractor, where the council of such village attempted to grant a "free tree trimming privilege" to the contractor.
2. In such a case a claim for damages on the part of the abutting lot owner is not such a claim as must be filed under the provisions of Section 3830, General Code, before suit is commenced.

*Allen M. Nichols and Davis & Paxton, for plaintiffs in error.
C. B. Nichols, Eli H. Speidel and Joseph Sagmeister, contra.*

JONES (Oliver B.), J.

Plaintiffs in error seek to reverse the judgment against them in the common pleas court by the defendant in error, who was plaintiff below, for damages done to her shade trees standing inside the curb line in front of her property upon a street in the village of Amelia.

Plaintiff in error, Charles Pommert, was the contractor with said village for the stringing of wires for supplying electric light both for lighting the streets and for commercial purposes in lighting the homes of its residents. Plaintiff below, Anna M. Hicks, claimed that in stringing these wires her shade trees had been

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unnecessarily, heedlessly, recklessly and maliciously cut and trimmed in such manner as to injure the beauty, health and probable life of the trees, and thus to damage her property.

There is no dispute as to the fact that the shade trees in question were the property of plaintiff, and that they had stood in the street in front of her property for many years and were highly desirable for the purpose of shade and in adding beauty to the appearance of the property. The record shows that the trees were very severely cut, many large limbs being taken out of the centers and tops of the trees, and that great injury was thus occasioned to them. It is contended, however, on the part of defendants, that all of the cutting that was done was necessary for the purpose of the proper stringing of the electric light wires.

Under Section 3618, General Code, the village has authority to establish, maintain and operate a municipal lighting plant and is empowered to determine the plan and method of its distribution. The stringing of wires upon poles in the streets is a usual method of conveying the current necessary for such lighting, and was the one adopted here, although other plans could have been used which would not have required any trimming of trees.

Our Supreme Court has recognized the property rights of the abutting lot owner in trees and shrubbery in front of his property and within the lines of the public highway. (*Phifer v. Cox*, 21 Ohio St., 248, and *Daily et al v. State*, 51 Ohio St., 348.) The village has, however, the power, by virtue of Section 3630, General Code, to regulate the planting, trimming and preservation of shade trees in the streets and highways.

On behalf of the plaintiffs in error it is contended that the council of the village has absolute discretion as to what constitutes an obstruction in a street, and that whenever a shade tree becomes such an obstruction in the opinion of council, the village has the right to cause its removal, and, therefore, that the village had the right to determine that it was necessary to trim and cut off all that portion of plaintiff's shade trees necessary to provide a free area within which to string the necessary wires for the light plant; that only such trimming had been done by

the village and its contractor, and that therefore plaintiff below was not entitled to recover.

In support of this claim of absolute discretion upon the part of the village officials counsel rely upon authorities such as *Chase v. Oshkosh*, 81 Wis., 313; *Tate v. Greensborough*, 114 N. Car., 392, and *Vanderhurst v. Tholcke*, 113 Cal., 147. Other cases leave the matter of necessity as a question of fact to be determined by the court and not arbitrarily by the officials of the municipality. *Frostburg v. Wineland*, 98 Md., 239, and *Everett v. Council Bluffs*, 46 Ia., 66.

In the case of *Newcomerstown v. Dickenson*, 14 C.C.(N.S.), 191 (affirmed 77 Ohio St., 597), it was determined that the officers of the municipality have no right to destroy shade trees in front of the property of an abutting property owner, unless their removal becomes necessary for street purposes. The question of this necessity was passed upon by the court, and a judgment rendered in favor of the property owner for damages because of the destruction of his shade trees was sustained.

In *Massillon v. Huff*, 14 C.C.(N.S.), 193, the question was left to the jury whether the contractors and the city engineer in the construction of the improvement of the street must of necessity have destroyed the trees, or whether the doing of the same was an unnecessary and wanton violation of plaintiff's rights, for which he might recover.

These cases would indicate that the declaration of council as to the necessity of the trimming of plaintiff's trees would not necessarily be final. A court could undoubtedly consider the facts in order to determine whether or not such official discretion had been abused, even if its existence to the extent claimed by defendants below were conceded. But in the case here presented by the record there was no determination by council as to the necessity of trimming plaintiff's trees. On the contrary, whatever action was taken by council was simply to grant to the village contractor, Mr. Pommert, as called for in his proposition to string the wires, a "free tree trimming privilege." The record fails to show any consideration by the council itself of what trimming was necessary or any order requiring any of the

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trees in question to be trimmed. And Mr. Pommert, the contractor, likewise failed to give any directions in regard to any specific tree. He simply bought four saws and placed them in the hands of his linemen, enjoining them, as he says, to do no more trimming than was necessary. Thus we find that if the absolute discretion is vested in council, they failed to exercise it, undertaking to devolve their rights in the matter entirely into the hands of their contractor, who in turn simply relied upon the good sense and discretion of his men, he himself not being present while most of this work was being done.

The evidence shows that the jury were justified in finding that unnecessary trimming had been done and that plaintiff had been thereby damaged. Although plaintiff's trees were the only ones trimmed in the stringing of the wires, no malice was shown in the matter, but a recklessness of her rights which seems inexcusable. And while the evidence might be considered unsatisfactory in fixing accurately the extent of this damage, the judgment as finally entered is fully supported by the evidence.

A careful examination of the record fails to show that there was any prejudicial error committed by the trial court either in the refusal of any of the special charges requested by defendants or in the general charge, which fairly submitted the case to the jury; nor do we find any other prejudicial error shown by the record.

A point is made by the plaintiffs in error that no claim for damages was filed under the provision of Section 3830, General Code, before suit was brought. This section has been construed by the Supreme Court in *Ironton v. Weihle*, 78 Ohio St., 41, and would not apply to such claim as is presented in this case.

The judgment will therefore be affirmed.

JONES (E. H.), J., and GORMAN J., concur.

DETACHMENT OF TERRITORY FROM MUNICIPALITIES.

Court of Appeals for Cuyahoga County.

THE VILLAGE OF NEWBURGH HEIGHTS V. H. L. FRENCH ET AL.

Decided, June 26, 1918.

Validity of Detachment of Territory Proceedings—Constitutionality of the Statutes Providing Therefor—Abandonment of Village Government and Erection of the Territory Into a Township Within the Discretion of Its Inhabitants.

1. The entire matter of the creation and organization of municipalities, the enlargement or restriction of their boundaries, and the raising, division and distribution of their revenues has been committed in Ohio to the Legislature, and the constitutionality of measures enacted by the Legislature in that behalf depends in no way upon their wisdom.
2. The statutes providing procedure for the detachment of territory from municipalities are constitutional enactments, and the result of an election for the detachment of territory can not be invalidated long thereafter on an allegation that the election was not held within the twenty day period, or that the expenses were borne by persons interested in securing such detachment.

Kraus & McMasters and J. A. Cline, for plaintiff.

Samuel Doerfler and Locher, Green & Woods, contra.

DUNLAP, J.

This cause is here on appeal from the judgment of the court of common pleas. The suit is brought by the village of Newburgh Heights, a municipal corporation. The defendants are the members of the deputy board of state supervisors and inspectors of elections for said county, who are sued in that capacity. Joined with them are the auditor of the county and the three members of the budget commission of the county.

The suit is the aftermath of an election and is brought to enjoin the holding of another and for further relief, which will be mentioned later in this opinion.

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The facts disclosed by the petition are: that on November 16, 1917, a petition was filed with the board of deputy state supervisors and inspectors of elections of Cuyahoga county, Ohio, properly signed, containing a description of certain territory which the petitioners desired to detach from said village of Newburgh Heights, and praying for an election for the purpose of determining whether or not the same should be detached and become a new township; that upon the filing of said petition said board of elections ordered an election to be held on December 4, 1917, and then later on November 28, 1917, without a new petition being filed, ordered the election to be held December 11, 1917, which was more than twenty days after the filing of the petition, and was thus contrary to law; that the election was accordingly held and resulted in a majority of the votes being in favor of the detachment of said territory and its erection into a new township to be called Willow; and the result of said election has been certified to the Secretary of State of Ohio.

It is then asserted that the territory described in said petition so sought to be detached from the plaintiff village contained about 1,800 acres of land, having a population of about 400 persons; that the total valuation of property on the tax duplicate of Newburgh Heights village prior to said election was about \$12,000,000, and that the tax valuation of property listed for the portion of said village sought to be detached was about \$11,000,000, leaving a valuation in Newburgh Heights village if said territory is detached of less than a million dollars, which will be inadequate to support the governmental functions of said village; that the portion which still constitutes the village has a very much greater population than the part here sought to be detached. It is also averred that the description of the part sought to be detached follows no regular or well-defined lines, but was drawn in such a manner as to include in it the large manufacturing plants of said village and farm land containing but few residences and mercantile buildings, and that said attempt to detach was instigated by certain large corporations owning valuable property in said detached part. It is

claimed that the detachment of said part was an unreasonable, arbitrary and an unfair division of the village, and that its detachment will work an irreparable injury to the village and its citizens. It is also complained that contrary to law one H. H. Shuler, an agent of the American Steel & Wire Company and other large corporations, promised and offered the petitioners signing said petition, prior to the signing of the same, that if they would sign the petition requesting that an election be held, that the said corporations would defray all expenses involved in the holding of said election, and in filing, recording and transcribing the records necessary to secure said detachment, and thus save the petitioners from any expense, and that said petitioners would not have signed the petition but for said promise, and that the same invalidates the election held by virtue of said petition.

The claim is made that said corporation inspired said detachment of territory for the purpose of evading their fair share of taxation.

It is also charged that no portion of said territory so sought to be detached is contiguous to an adjoining township as required by law, but it is conceded in a supplemental petition, filed for the purpose of putting the court in possession of the exact facts regarding its contiguity to an adjoining township, that the territory sought to be detached from said village was at all times mentioned in the pleadings contiguous to and did adjoin the township of Cleveland, the township of Brooklyn Heights, the township of East Independence, and the township of South Newburgh; that the township of Brooklyn Heights was coterminous in boundary with the village of Brooklyn Heights; that the township of East Independence was coterminous in boundary with the village of Independence; that the township of South Newburgh was coterminous in boundary with the village of South Newburgh; that the boundary line of the township of Cleveland was coterminous with the boundary line of the city of Cleveland at all points where said boundary line was contiguous to and adjoined the territory sought to be detached, but that at other points the city of Cleveland included

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territory not included within the township of Cleveland, and that no township officers perform any duties in the city of Cleveland adjoining Newburgh Heights village as originally constituted.

Having cited these claimed violations of the law in the proceedings leading up to and consummated in said election of December 11, 1917, and which it is claimed render all of said proceedings invalid and of no force and effect, information is then given to the court that the county commissioners have given notice that an election will be held on February 2, 1918, for the purpose of selecting officers of Willow township, being that portion of the territory sought to be detached, and that the deputy state supervisors and inspectors of elections are preparing to and will prepare, unless enjoined by the court, ballots for said election, and will hold said election for the purpose of choosing the officers of Willow township; that said election will be of no force and effect and will be an unlawful expenditure of the funds of the county and of Newburgh Heights village.

It is apparent that if said election has not been held on said date it never will be held on said date, and we are somewhat of the opinion that this obvious fact should have some bearing upon the remedy which plaintiff's counsel should now attempt to pursue. In other words, it seems vain to ask us to enjoin a matter which must either already be an accomplished fact or else impossible of performance. This consideration should perhaps dispose of this whole case. Very evidently we can not enjoin an election which has already been held. This point while not raised necessarily disposes of the question as to whether or not we can enjoin this election.

Some further consideration upon our part of the facts plead is perhaps necessary on account of the other relief asked for in the petition. It is sought to enjoin the budget commissioners from fixing the tax rate for said Willow township, and from depriving Newburgh Heights Village of the taxes so fixed in said Willow township, and depriving Newburgh Heights village of the taxes payable on said property. It is apparent that this

additional relief can not be granted to the plaintiff if the township of Willow has a legal existence. If, by the election of December 11th, and by the certification of its proceedings to the Secretary of State, it came into legal existence, if those proceedings were not utterly void, then the granting of this relief would be improper. The territory which attempted to detach itself from said village had under the law an apparent right to do so, provided it was contiguous to a township.

The facts contained in the supplemental petition referred to above do, we think, bring this case within the provisions of Sections 3577-1, 3577-2 and 3577-3 of the General Code of Ohio, being the act of May 7, 1915 (106 Ohio Laws, 301), and we so hold. The fact that the election date for the original election for the detachment of this property was changed from December 4th to December 11th, whether that latter date came within the twenty day period or not, does not make the election void. Persons interested in said election should have taken proper steps to see that it was legally held. They can not wait until long afterwards and then attack it collaterally when the new township so created seeks to operate under the powers and rights which were supposed to be secured by the election. The claim that the petition for the original election was invalid because the petitioners were induced to sign on the representation that the expenses incident to the election would be defrayed by other parties, must be overruled. The statute merely provides that the expenses shall be defrayed by the petitioners and that the election officials may require the payment of such expense in advance as a condition precedent to the taking by them of any of the steps provided for in the statute. It is a matter of common experience and common knowledge that such expenses are generally borne by some persons who are particularly interested, and we know of no rule or principle of law deciding that after an election has been held the same may be over-turned by reason of such conduct upon the part of interested parties. We decide against the plaintiff upon this point.

With regard to the claim that the provisions of the General Code under which this detachment was effected is unconsti-

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tutional, we think that in similar cases decided by the Supreme Court of Ohio that court has sustained the constitutionality of such statutes. We refer particularly to the cases of the *State Board of Health v. City of Greenville*, 86 O. S., 1; *Blanchard v. Bissell*, 11 O. S., 96; *Metcalf v. State*, 49 O. S., 586; *State, ex rel, v. Cincinnati*, 52 O. S., 419. We believe that these authorities establish the proposition that the entire subject-matter of the creation and organization of municipalities and of the enlargement and restriction of their boundaries has been unreservedly committed to the discretion of the Legislature by virtue of the constitutional provision that the General Assembly "shall provide for the organization of cities and incorporated villages by general laws;" and that the extent to which the revenues and the future activities of a municipality may be affected by the detachment of a portion of its territory is a matter for the consideration of the Legislature and for it alone. We believe that the question of the wisdom of the legislation which permits this detachment of property has nothing to do with determining its constitutionality. The question of the wisdom of such legislation is for the Legislature. This court might think and perhaps does think that it is the most unwise kind of legislation, but this consideration can in no way control our action. It is solely a question of power. If the Legislature has constitutional power to enact a law, no matter whether the law be wise or otherwise, it is no concern of the court. Thus, in spite of the arbitrariness of the boundaries fixed for this detached territory; in spite of the damage that may be done to the remaining territory, it was within the province of the Legislature to enact the law under which this detachment occurred, and in our opinion the statute under which the detachment took place is constitutional.

We have no doubt that the situation which has occurred in this village is unfortunate, and we deeply deplore its occurrence, but our conclusion that the statute is constitutional deprives us of all power to consider the allegations of the petition to the effect that the line is arbitrary and unfair. All that we can say upon this point is that the Legislature did not see fit to define where such lines should run in its enactment and put no limita-

tions upon the same. All that the court can say from examination of this petition is, that the inhabitants of a certain territory wished to relinquish their village government and again become a township. The laws of Ohio provide for the gratification of this desire.

So far as we are able to ascertain the provisions of the statute have been sufficiently complied with so as to at least insure their validity against a collateral attack such as we must necessarily regard this suit to be.

We regard the petition and supplemental petition as insufficient in law in that it does not contain facts sufficient to constitute a cause of action against the defendants or any of them, and the demurrer to the same will be sustained at the costs of the plaintiff.

GRANT, J., and LAWRENCE, J., concur.

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Confusion in instructions as to the nature of the contract sued on, leaving the jury to infer that an implied contract could be established by the same evidence as an express contract. 134.

The reading of the petition to the jury as a part of the charge, wherein an element of damage was claimed which was not supported by any evidence, does not constitute error, when. 359.

Conflicting propositions of law embodied in charge. 410.

Not error to refuse to submit special written propositions of law, at request of counsel after argument, where the law necessary for determination of the issues has been given in clear language. 325.

CITY SOLICITOR—

Duty of the city solicitor of Hamilton to act as the prosecuting attorney of the municipal court; county commissioners should allow compensation. 527.

CONFLICT OF LAWS—

Where a will is made in another state by a resident of Ohio, and there is conflict between the laws of the two states, a presumption arises of an intention that the estate should be administered under the law of Ohio. 177.

CONSTITUTIONAL LAW—

Sections 886, *et seq.*, providing for the licensing and regulation

of private employment agencies, is a valid exercise of police power. 169.

Under an act, requiring that certain licensees shall be issued only to persons of good moral character, failure to provide a standard for determining what constitutes good moral character does not render it invalid. 169.

In a proceeding in error from a mayor, involving the validity of an ordinance, the reviewing court is not at liberty to consider the ordinance unless it has been incorporated in the record. 285.

Sections 3673 and 3676, are unconstitutional in so far as they purport to authorize the requiring of licenses from transient dealers, and an ordinance based on these statutes is without effect. 285.

The amendment to Section 5211, relating to exemption from jury service, is a valid enactment. 315.

The district tuberculosis hospital act is a constitutional enactment. 329.

The Cleveland ordinance providing for the regulation and licensing of public laundries is a valid enactment. 561.

An ordinance will not be declared invalid because of some provision in excess of the power granted to municipalities. 561.

The vesting in the health commissioner of the duty of determining what shall constitute adequate ventilation and plumbing for a public laundry is not such a delegation of judicial power as to render the ordinance invalid. 561.

The constitutionality of an act relating to the enlargement or restriction of the boundaries of a municipality or the raising and distribution of its revenue depends in no way upon its wisdom. 586.

The statutes providing procedure for the detachment of territory from municipalities are constitutional enactments. 586.

CONTEMPT—

A proceeding for contempt is *quasi* criminal in its nature with the presumption in favor of the innocence of the defendant, and conviction can only be had on an affirmative showing of guilt. 14.

One convicted of contempt can not be imprisoned for failure to pay the fine and costs imposed. 194.

Where conviction for contempt is lawful but the sentence illegal, a reasonable time will be given for resentence before an order for discharge is made in habeas corpus proceedings. 194.

A commissioner authorized by a court of another state to take depositions in this state may commit to jail a witness who refuses to answer. 413.

The plea that parties who are in contempt of court committed the offense while acting under the advice of counsel is not a defense but may be considered in mitigation. 572.

Violation of an injunction after perfection of an appeal from an order suspending the injunction is contempt of court. 572.

CONTRACTS—

Of bailment—see BAILMENT.

Evidence necessary to establish an express contract and also that required in the case of an implied contract. 134.

Contracts between the Ford Motor Co. and its agents are not monopolistic, in restraint of trade or contrary to public policy; nature of these contracts. 161.

Where the meaning of a written contract is not clear, it will be construed most strongly against the person who prepared it. 462.

Stock dividends paid to an executor; disposition of. 1.

The defense of *ultra vires* is not available in an action against a company on an indebtedness incurred in the purchase of its own stock, when. 574.

Estoppel lies against the owner of a company deriving a benefit from the use of the alias of the company. 574.

COUNTY COMMISSIONERS—

Technical precision will not be required, and legitimate discretion will not be interfered with by the courts; the clerk of the board is not a county officer. 337.

COURTS—

Jurisdiction of the court of domestic relations. 49.

Will not interfere with the action of tribunals designated by the Legislature to perform certain duties, unless. 129.

Jurisdiction of the court of appeals to review an election contest. 201.

A bequest of "first mortgage bonds of the Gallipolis Gas & Electric Co." is a demonstrative and not a specific legacy. 206.

Conversion of bonds so bequeathed does not adeem the legacy, but it may be satisfied out of any fund not specifically devised. 206.

Determination of title by the probate court may be pleaded in bar to proceedings in another court raising the same issue. 481.

COVENANTS—

Running with the land may be created without the use of particular words; consistency of the burden and an intention to impose it are the determining factors; easement for a pipe line in consideration of free gas. 513.

CRIMINAL LAW—

Discretion to grant a commission to take depositions in a criminal case must be limited to the facts joined in the indictment. 345.

Gist of the offense in a prosecution under the pure food law. 345.

If the original act of taking was a trespass, an intent to steal constitutes larceny, although not

formed until after the property was in possession. 410.

Prosecution for providing beer in the basement of a private house in dry territory to be drawn and consumed by privileged persons at their convenience. 523.

Election between counts; distinct offenses joined in different counts of the same indictment. 538.

Where there is a plea of not guilty the court is not required to direct the jury to return special findings or answer interrogatories, whether the defendant is a person or a corporation. 538.

Absence of motive; statements by the accused distinguished from confessions of guilt. 545.

The jury as a whole, and not individually, should be convinced of guilt beyond a reasonable doubt before a verdict of guilty is returned. 545.

Special requests in charge to jury; confusion of issue by a multiplicity of requests. 545.

DAMAGES—

For injuries sustained must be limited to those reasonably certain to result from the injury. 369.

DEEDS—

A declaration contained in the deed as to the purpose of the grant is without effect, unless; presumption that the whole title passed; conditions lessening the estate conveyed must be strictly construed. 305.

DEFENSES—

All defenses will be presumed to have been put at rest by the judgment entered. 137.

The defense does not lie that the landlord did not make reasonable efforts to re-let the abandoned premises for which he is seeking to recover rental. 438.

DEPOSITIONS—

Discretion to grant a commission to take depositions in a

criminal case is reposed in the trial court, and unless clearly abused a reviewing court will not reverse an order denying the application for such a commission. 345.

An application for a commission to take depositions is limited by statute to issues of fact joined in the indictment, and in a prosecution before a justice of the peace, where there is no indictment, he should overrule such an application. 345.

DESCENT—

Where the parents of the claimant were married after he was begotten and divorced before he was born. 309.

DISTRIBUTION—

Per capita favored where a testator leaves undetermined portions in which beneficiaries are to share. 321.

DITCHES—

Purpose of ditch laws; drainage and assessment of cost in the hands of township trustees who may employ an engineer and will not be interfered with by the courts, unless. 129.

Not necessary that an interested party make a request that tiling be done, when. 366.

A township trustee may, in his capacity as a property owner, petition for a township ditch. 366.

DIVIDENDS—

Disposition of stock dividends by an executor to whom they have been paid. 1.

DIVORCE AND ALIMONY—

Allowance of alimony to wife not a charge on the future earnings of the husband. 108.

Alimony may be decreed in weekly payments of specified amounts. 108.

A court has power in a divorce proceeding to order payment of a fixed sum monthly to the clerk of court to be kept by the clerk of court for the future use and benefit of minor children. 194.

On a petition for divorce and alimony by a husband alimony may be awarded even though a divorce be refused. 225.

A husband, unable to support himself, may compel his support by the wife regardless of any right to maintain an action for alimony alone. 225.

Where an injunction is issued in an action for alimony, against disposition of property, judgment when taken relates back to the date of the granting of the injunction. 399.

All right to a future revision of a decree for alimony is foreclosed, notwithstanding continuing jurisdiction, when. 429.

Payment of a gross sum as alimony usually ends jurisdiction; an award of real estate as alimony is final and may not be modified at a subsequent term. 429.

Application for an allowance covering fees to counsel should be made by the wife, and not by her attorneys in their own behalf. 433.

No review by error proceedings nor appeal can be had from a decree of divorce. 449.

On appeal or error as to the right to an allowance of alimony, the parties are not concluded as to the validity of the marriage by the decree of divorce previously rendered. 449.

Where a husband, resisting an allowance of alimony, claims that he was never divorced from a former wife who is still living, it is error to reject testimony as to such former marriage. 449.

EASEMENT—

Validity of an easement for a pipe line, given in consideration for free gas. 513.

EJECTMENT—

May be maintained for removal of high tension wires strung over a lot not adjacent to an electric railway company's tracks to which the wires belong. 249.

ELECTIONS—

The term "general election" is applicable under the Constitution and statutes of Ohio to elections only which are held on the first Tuesday after the first Monday in November. 10.

A vote on constitutional amendments constitutes a special election unless held on the date of the regular November election; pay of judges and clerks for services at such an election. 10.

A judgment by the court of common pleas in an action to contest the election of a mayor may be reviewed by the court of appeals. 201.

Presumption of regularity of an official count; nature of the evidence required to warrant a court in setting the presumption aside. 209.

An election for detachment of territory from a municipality can not be invalidated long thereafter on an allegation that the election was not held within the twenty days period or that the expenses were borne by persons interested in securing such detachment. 586.

EMINENT DOMAIN—

What a railway company must prove by a preponderance of the evidence where it has been incorporated in another state and is seeking to appropriate property in this state. 92.

EMPLOYMENT AGENCIES—

The act providing for the licensing and regulation of private employment agencies is a valid exercise of the police power. 169.

ERROR—

Proceedings in error from judgments by justices of the peace. 77.

Can not be prosecuted by one not a party to the proceedings below. 433.

Can not be prosecuted to a decree of divorce. 449.

ESTOPPEL—

Lies against use by the owner

of a corporation of the *alias* of the corporation. 574.

EVIDENCE—

Degree of proof required to convict of contempt. 14.

Finding of a trial judge on the evidence will not be disturbed by a reviewing court, where the evidence is such that different minds might reach different conclusions. 14.

Final judgments by justices of the peace may be reviewed on the weight of the evidence, whether tried with or without a jury. 77.

Competency of evidence by the wife of the plaintiff where the action is against the estate of a decedent for services rendered by the wife. 81.

Evidence of habit is of a circumstantial character; competency of secondary evidence. 119.

What is necessary to establish an express contract and what is required in case of an implied contract. 134.

In a will contest evidence is not barred because referring to an issue not mentioned in opening statement to the jury. 217.

A hypothetical question should not be excluded because it is not framed on the best evidence, where evidence has been offered tending to prove the facts enumerated. 217.

In a will contest; competency of testimony by the attorney of the testator who acted as a subscribing witness; incompetency of declarations made by a deceased subscribing witness. 257.

In an action on a policy of insurance photographs of buildings blown down during the same storm in which plaintiff's building fell were properly excluded, when. 273.

An agreement in writing, providing how a possible judgment in a pending case against the parties should be liquidated is admissible in evidence as an admission against interest. 289.

A reviewing court is without authority to reverse a second time a judgment against the same party on the same evidence. 325.

Witnesses can not be examined as to matters wholly collateral merely for the purpose of contradicting them by other evidence. 369.

A physician, in testifying as to physical injuries received by the plaintiff which form the subject of the action, can not base his statement on anything told him by the plaintiff with reference to her condition. 369.

Objections to evidence must be promptly made. 369.

An equivocal or ambiguous entry appearing upon the docket or journal of a court may be explained by parol evidence. 446.

Competency of evidence, in an action for alimony, as to a former marriage of the defendant to a woman who is still living and from whom he was never divorced. 449.

Weight of, as determined by the finding of the jury, will not be set aside where reasonable under all the light obtainable in the case. 497.

Legal evidence includes every known means for ascertaining the truth. 497.

Tender of incompetent evidence and the evil resulting therefrom. 545.

EXCAVATIONS—

Where an excavation is carried more than nine feet below the curb and adjoining property is injured thereby, liability arises regardless of the degree of care and skill exercised; this liability is continuing; owner of property in a district subject to floods subject to the same rule. 528.

EXECUTION—

An automobile is not an "implement" within the meaning of the statute exempting certain articles from levy and execution. 44.

EXECUTOR—

May contest the will under which he is serving, when; disposition of stock dividends received by him; delivery of estate to widow to hold for life; rights of remaindermen. 1.

FINDINGS—

Where a general verdict is signed by twelve jurors, special findings of fact signed by nine jurors are properly received by the trial court. 17.

A finding by a trial judge on the evidence will not be disturbed by a reviewing court where the evidence is such that different minds might reach different conclusions. 14.

FORCIBLE ENTRY—

Jurisdiction of justice of the peace in, is limited to the township in which he was elected. 262.

GAS MAINS—

Cost of relocating, made necessary by change of grade of a vacated street, can not be collected from the abutting owner. 329.

GIFTS—

A deposit made in bank by a mother, payable to herself or her daughter or the survivor of either of them, is not a gift to the daughter *inter vivos*. 222.

GOVERNMENTAL FUNCTION—

The collection of garbage by a municipality is not a governmental function. 25.

HOMESTEAD—

An automobile can not be claimed as exempt in lieu of homestead where the owner and his wife were the owners of a homestead and living therein at the time execution was levied, notwithstanding the property was mortgaged for more than it was worth and was conveyed to one of the mortgagees after the levy was made. 44.

Concealment by a debtor of property not in the custody of the court will not be deemed an election on his part to take that property in satisfaction of his claim in lieu of homestead, when. 442.

HOMICIDE—

The absence of any evidence tending to show a motive for the crime is a circumstance to which the attention of the jury should be directed by the court, with the instruction that it should be considered together with all the evidence and circumstances of the case in determining guilt or innocence. 545.

Whether statements made by the accused were admissions of guilt should be left to the jury. 545.

HUSBAND AND WIFE—

Section 12001, providing for an injunction against a husband on petition of his wife, restraining him from wasting or squandering or fraudulently converting to his own use property held by her in her own right, has no application to a woman married since the passage of the married woman's act of 1887. As to such women Section 12001 is obsolete, and the appointment of a receiver to manage and control the separate property of a woman married since 1887 is without force and effect. 49.

Right of a husband to recovery for services rendered by his wife; competency of testimony by the wife where the claim is against the estate of a decedent. 81.

INJUNCTION—

Refused against one who sold a partnership interest under an agreement not to engage in the same business again. 126.

Against an overhanging cornice. 239.

INSURANCE—

Failure of a foreign insurance company to comply with regula-

tions required by the statute before doing business in this state does not render void a contract of insurance entered into by it. 37.

State deposits of a foreign insurance company which has become insolvent may be distributed direct to Ohio policy holders. 113.

Status of claims against an insolvent company not filed within the time fixed. 113.

Deposits of foreign indemnity companies are liable to creditors of those bonded by such companies. 139.

INSURANCE (Fire)—

Liability under a policy to which had been attached a lightning clause can not be avoided for false swearing, merely because the affidavit for proof of loss termed the loss a fire loss, where it was in dispute whether the building covered by the policy, which collapsed without combustion, was blown down by the high wind which accompanied the storm, or was thrown down by a bolt of lightning. 273.

Under a policy covering an ice making plant the valued policy rule is applicable to the cooling tower and machinery contained therein, where the buildings and machinery are used as an entirety and come within the valued policy rule in other respects. 273.

An insurance company is not at liberty to refuse to name an appraiser in accordance with the provisions of the policy, where the only reason for refusal is that some work has been done in the way of restoration of the damaged property. 273.

A finding by the jury to the effect that the collapse of the building covered by the policy in suit was due to a bolt of lightning, which however caused no combustion, will not be disturbed by a reviewing court, when. 273.

It is not error to exclude photographs of buildings blown down during a violent storm, where they were located many squares from plaintiff's building and the

record fails to show that plaintiff's building was in the path of the wind storm. 273.

Reformation of policy by making it correspond with the intention of the parties; description of the property covered corrected. 462.

INTENT—

To steal constitutes larceny, although not formed until after the taking. 410

INTOXICATING LIQUORS—

Sufficiency of proceedings for establishment of dry territory in a residence district. 155.

Registered voters are qualified signers of petitions for the making of territory dry. 155.

One making provision for a supply of beer to privileged persons in dry territory is amenable to the statute. 523.

JUDGMENT—

All defenses will be presumed to have been put at rest by the judgment, unless. 137.

JURISDICTION—

Of the court of domestic relations. 49.

Of a justice of the peace in forcible entry and detainer. 262.

Is determined by the pleadings; when the petition contains an averment sufficient to invoke the jurisdiction, the question must be met by an issue of fact. 364.

Of the probate court in an action involving the right of property. 481.

JURY—

Validity of the amendment of Section 5211 relating to jury service. 315.

JUSTICE OF THE PEACE—

Final judgments rendered by justices of the peace may be reviewed by proceedings in error on the weight of the evidence, whether tried with or without a jury. 77.

Grounds for a new trial not limited to those named in Section 10352; may also be granted on grounds named in Section 10361. 302.

Jurisdiction of justice of the peace in forcible entry and detainer is co-extensive with the county, but must be exercised in the township in which the justice was elected. 262.

A judgment is void where the justice in such a case makes the summons returnable in a township other than the one in which he was elected and hears the case and renders judgment in such other township. 262.

Where the action is within the jurisdiction of a justice of the peace, appearance and consent to a continuance bars a motion to dismiss for want of jurisdiction. 423.

JUVENILE COURT—

See COURTS.

LABOR UNIONS—

Combinations of workmen and legitimate means of enforcing their demands. 501.

An owner may contract that work shall be performed by union labor only, and where such an agreement has been entered into the union may insist that the provision be adhered to; a non-union contractor, shut out by such a provision, is without ground for action against the union. 501.

LANDLORD AND TENANT—

In an action for recovery of rental of premises abandoned by the tenant, the defense does not lie that the landlord failed to use reasonable diligence to secure another tenant. 438.

Where a lessee holds an option for an extension of his term, notice of his election to take an extension is not necessary unless required by the terms of the lease. 401.

A tenant by sufferance has no term, but occupies merely through

forbearance of the landlord to act. 401.

LARCENY—

The taking of an automobile for a joy ride is larceny, where an intent was subsequently formed to sell the machine and appropriate the proceeds. 410.

LEASE—

See LANDLORD AND TENANT.

LEGACY—

The deposit by a mother of money in a bank, payable to herself or her daughter or the survivor of either of them, is not a testamentary disposition of the fund to the daughter. 222.

LICENSE—

May not be required from a transient dealer. 285.

LIENS—

A judgment by relating back to the first day of the term is not thereby made prior to a later mortgage, the proceeds of which were used in liquidating pre-existing liens. 491.

LIEN (Mechanic's)—

It is not necessary that the debtor possesses real estate to which a mechanic's lien may attach in order to render it effective. 348.

Where machines are sold for and used in the repair of a factory belonging to the purchaser, the seller has a mechanic's lien upon them, although they are not attached to the building or made permanent fixtures. 348.

LIS PENDENS—

An action for alimony becomes *lis pendens* against property described in the petition and covered by an injunction, from the date of the filing of the petition and issuance of the injunction, and judgment taken thereafter relates back to the date of the issuance of the injunction. 399.

LOITERING—

May be punished under the statute relating to vagrancy. 353.

MALICIOUS PROSECUTION—

It is error to exclude parol evidence in explanation of an ambiguous entry purporting to be a dismissal of the plaintiff from the prosecution of which he complains. 446.

MANDAMUS—

Proceedings in mandamus can be reviewed in the court of appeals only on error. 543.

MARKET VALUE—

Should be determined from sales which have been made, and not by deduction from broad generalizations. 454.

MISCONDUCT—

Alleged misconduct, occurring during the trial in the presence of the court, should be brought upon the record by bill of exceptions certified by the trial judge, and may not be shown by affidavit. 17.

A judgment will not be reversed for misconduct of counsel in the absence of a report disclosing what, if anything, was said by complaining counsel which provoked the remarks complained of. 257.

MOB—

Liability of a county for the death of one killed by a mob; infliction of injury or the causing of death of the person attacked must have been the definite object of the mob at the time. 145.

MONOPOLY—

Stock ownership not permitted in competing lines of railway. 241.

MORTGAGE—

Mortgagee subrogated to the rights of pre-existing lienholders. 491.

MOTOR VEHICLES—

An automobile is not an "implement" within the meaning of the statute exempting certain articles from levy and execution. 44.

Nor can an automobile be claimed as exempt in lieu of homestead, where the owner and his wife were the owners of prem-

ises and were living therein at the time the levy was made, notwithstanding the property was mortgaged for more than it was worth. 44.

Degree of care required of a motorman toward one rightfully on the track and in peril. 88.

Liability for injury caused by a machine while being driven by the escort of a young lady whose father owned the machine. 294.

MUNICIPAL CORPORATIONS—

The collection of garbage by a municipality is not a governmental function, and in an action against the municipality for damages on account of the death of plaintiff's intestate through the negligence of a garbage collector employed by the municipality, it is error to direct a verdict for the defendant. 25.

Method of levying assessments for street improvements; certification of the assessing ordinance is directory only; provision for five per cent. additional from the date the assessment falls due is not a penalty but a fixing of the rate of interest. 265.

The Columbus ordinance regulating the location, construction and operation of public gasoline and oil filling stations or sales depots is not open to constitutional objection, but its provisions are prospective only. 273.

But an old structure used as a gasoline and oil filling station may not be torn down and a new plant of greatly increased capacity erected in its stead in disregard of the ordinance. 281.

In an action before a mayor involving the validity of an ordinance a reviewing court is not at liberty to consider the ordinance unless it has been incorporated in the record. 285.

Sections 3673 and 3676, G. C., in so far as they authorize the requirement of licenses from transient dealers doing business within the municipality are unconstitutional, and an ordinance based

on these statutes is without effect. 285.

City not liable to abutting owners for change of grade of street, unless. 465.

The power to determine when it is necessary to improve or repair a sidewalk is vested in the city council; but a court of equity will intervene to prevent arbitrary action of a manifest abuse of discretion. 369.

The authority vested in municipalities to contract for garbage disposal does not authorize the creation of a continuing nuisance, and injunction lies against the operation of a plant which has become a menace to the health and comfort of the people. 577.

Validity of proceedings providing for the detachment of territory from a municipality; abandonment of village government and erection of the territory into a township within the discretion of its inhabitants. 586.

MUTUAL BENEFIT SOCIETIES—

The answers of an applicant for membership must be considered as a whole; determination as to the truth or falsity of such answers is for the jury. 506.

NEGLIGENCE—

An electric railway company, in order to fulfill its duty of exercising ordinary care, is required to use greater care where a child of tender years is threatened than where one of mature years is in peril. 17.

In the case of a child of tender years there can be no inference that it will run either in front of the car or away from it, and a motorman should operate his car with the thought in mind that the child may do either. 17.

The negligence of a garbage collector is the negligence of the city employing him; to direct a verdict for the defendant in an action for damages on account of in-

jury growing out of such negligence is error. 25.

Motorman bound to use ordinary care toward one rightfully on the track and in a position of peril. 88.

Where a passenger was injured by being pushed from car by motorman. 119.

Gross negligence not shown in the transmission of a telegraph message, when. 150.

As between two occupants of an automobile in collision with another machine. 294.

Where there are two plausible theories of an accident the one adopted by the jury will be upheld. 294.

Degree of negligence where the evidence shows negligence on the part of both the employer and the employee who was killed. 316.

An employee, electrocuted by wires within ten feet of the machine at which he had been assigned for work, held to have been acting within the scope of his employment. 316.

In an action against an employer for the wrongful death of an employee the law presumes that both parties were free from negligence. 316.

Where one was injured by the sudden starting of a street car as he was in the act of boarding it. 359.

A tortfeasor other than the employer may be sued by an injured workman who has received compensation from the state fund. 382.

A warehouseman is liable for damage by an unprecedented flood to goods stored in his warehouse when his own negligence commingled as an active agent in causing the damage. 385.

Proximate cause of injury where an employee on a motor truck with his legs hanging over the side caught his foot in the sprocket wheel. 477.

NEW TRIAL—

Authority of justice of the peace to grant. 302.

NOTICE—

Failure of a new administrator to give notice of his appointment, prevents the running of the statute of limitations. 249.

NUISANCE—

Maintenance of a nuisance alleged against a fertilizer company. 538.

Injunction lies against a garbage disposal plant which has become a menace to health and an injury to private property, notwithstanding it is operated under contract with a municipality and is equipped with the most modern facilities and skill and care are used. 577.

OFFICE AND OFFICER—

The clerk of the board of county commissioners is not a county officer. 337.

OPTION—

A written optional contract for a nominal consideration given by the owner to sell his real estate is not a sale thereof, but only a standing offer to sell to the person and at the price named within the time stated in the contract, and the holder of the option does not acquire any title unless he accepts the offer prior to its expiration. 33.

After the offer has been accepted by the holder of the option the contract becomes binding on both parties and the said holder becomes vested with an equitable title thereto. 33.

PARENT AND CHILD—

The legitimacy of a child is not affected by the fact that it was begotten before the marriage and born after the divorce of its parents. 309.

PARTNERSHIP—

Where a partnership was dissolved and the defendant, contrary to agreement, did some work on his own account. 126.

Injunction does not lie against the doing of work in no sense spe-

cial, unique or extraordinary (such as window cleaning) by one who has retired from a partnership engaged in that business. 126.

Contract which constituted a partnership notwithstanding a declaration that a partnership was not intended. 289.

Facts connected with a business relationship which constituted it a partnership. 289.

PARTY WALL—

The establishment of a party wall does not by implication give one proprietor the right to extend his structure over the adjoining lot. 239.

PASSENGER—

One who is in the act of stepping on a street car is a passenger, and in case of accident while stepping on the car his rights are those of a passenger. 359.

PHYSICIAN—

May not base his testimony as to injuries sustained on complaints made to him by the injured party. 369.

PLEADING—

Negligence need not be averred in an action under a contract of bailment which contains an agreement to pay for goods lost or destroyed. 394.

PRESUMPTION—

There can be no inference as to what a child of tender years will do under circumstances of peril. 17.

As to the regularity of a proceeding in which alimony was allowed. 108.

A presumption arises that a will made in another state by a resident of Ohio was made with the intention that its provisions shall be governed by Ohio law. 177.

As to the regularity of an official count of the result of an election. 209.

That a deed of general warranty passes the whole title. 305.

Of freedom by both parties from negligence in an action against an employer for the wrongful death of an employee. 316.

PRIVILEGED COMMUNICATIONS—

An attorney for a testator who at his request acts as a subscribing witness to his will is not bound by Section 11494 as to privileged communications. 257.

PROCEEDINGS IN AID—

Against a contractor for recovery of retained percentages; homestead exemption claimed and allowed. 442.

PROHIBITION—

The writ of prohibition can not be made a substitute for a writ of error, and in order to invoke the writ there must be an absolute want of jurisdiction. 364.

PROPERTY—

Right of possession of, may be tried in the probate court. 481.

PROSECUTING ATTORNEY—

The city solicitor of Hamilton is prosecuting attorney of the municipal court. 527.

PUBLIC CONTRACTS—

Proceedings against a contractor in aid of execution; retained percentages found to belong to the contractor's wife; homestead exemption claimed and allowed. 442.

PUBLIC POLICY—

Extent to which public policy as announced by the Supreme Court with reference to relief associations has been changed by subsequent legislation. 65.

PURE FOOD LAW—

The gist of the offense in a prosecution under the pure food law is the illegal sale; identity of the purchaser not an essential element. 345.

RACE DISCRIMINATION—

Refusal of seat in certain part of theater on account of race or

color subjects the proprietor to a penalty. 231.

RAILWAYS—

Where high tension wires are maintained by an electric railway over land not adjacent to its tracks, an action in ejectment may be maintained by the owner. 249.

Restraint of trade brought about through railway control; stock ownership permissible in kindred but not in competing lines; companies ousted from control acquired through an agreement. 241.

Failure of a railway company to deliver cars because of an embargo does not prevent the running of demurrage. 29.

Right of a member of a railway relief department to sue the company for injuries suffered through its negligence. 65.

The rate of the carrier duly filed pursuant to the Interstate Commerce act is the only lawful charge and is binding alike on shipper and carrier. 77.

A shipper is charged with notice of the regular fixed tariff freight rate duly filed, and a misquotation of the rate by the carrier's agent will not relieve the shipper from paying the tariff rate, although he has made the shipment and paid the quoted rate therefor. 77.

What a railway company incorporated in another state must establish as a preliminary to the appropriation of property in this state. 92.

Determination of the market value of a railway company which has been absorbed; must be ascertained from sales, and not by deduction from broad generalizations. 451.

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